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LEGAL FEES

HEARINGS
BEFORE THE
SUBCOMMITTEE ON
REPRESENTATION OF CITIZEN INTERESTS
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
NINETY-THIRD CONGRESS
FIRST SESSION
ON
THE EFFECT OF LEGAL FEES ON THE ADEQUACY
OF REPRESENTATION

PARTS III AND IV
SEPTEMBER 19 AND 20; OCTOBER 1, 2, 4, AND 5, 1973

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(II)

CONTENTS

PART I

CONSUMER ACCESS TO REPRESENTATION AND MINIMUM FEE SCHEDULES

HEARING DAYS

Wednesday, September 19, 1973.....	Page 1
Thursday, September 20, 1973.....	83

TESTIMONY

STATEMENT OF SUBCOMMITTEE MEMBERS

Wednesday, September 19, 1973

Tunney, Hon. John V., U.S. Senator from California, chairman, Subcommittee on Representation of Citizen Interests.....	1
Cook, Hon. Marlow W., U.S. Senator from Kentucky.....	5

Thursday, September 20, 1973

Tunney, Hon. John V., U.S. Senator from California, chairman, Subcommittee on Representation of Citizen Interests.....	83
------------------------------------------------------------------------------------------------------------------------	----

WITNESSES

Armstrong, Walter P., attorney at law, on behalf of the American Bar Association.....	127
Durham, Delores, car buyer, Washington, D.C.....	37
Ferren, John M., attorney at law, author of "Antitrust and Ethical Aspects of Lawyers' Minimum Fee Schedules".....	144
Goldfarb, Lewis H., homebuyer and plaintiff in <i>Goldfarb v. Virginia State Bar</i> ; accompanied by: Alan Morrison, attorney at law.....	84
Kornher, Mr. and Mrs. Kenneth L., homebuyers, Fairfax County, Va.....	6
Ring, Leonard M., president, Association of Trial Lawyers of America; accompanied by: Jack Travis, treasurer, Association of Trial Lawyers of America.....	137
Rothschild, Professor Donald, George Washington University Law School; accompanied by: Ricardo D. Moreno, president, Ayuda, law student; and Winthrop N. Bardo, student director of Consumer Protection Center, George Washington University Law School.....	43
Weaver, Peter, nationally syndicated consumer columnist.....	21
Woodson, James, on behalf of Virginia State Bar.....	119
Wilson, Bruce, Acting Assistant Attorney General, Antitrust Division, U.S. Department of Justice; accompanied by: Lewis Bernstein, Chief of Litigation Section; Keith I. Clearwaters, special assistant to the Assistant Attorney General.....	164

EXHIBITS AND APPENDIX DOCUMENTS AND CORRESPONDENCE

Bernstein, Lewis, chief, Special Litigation Section, Antitrust Division, U.S. Department of Justice, remarks prepared for the National Conference of Bar Presidents, August 4, 1973.....	181
Burns, Kenneth J., Jr., secretary, American Bar Association, letter to Presidents of State and local Bar Associations dated November 14, 1973, suggesting consideration of canceling minimum or suggested fee schedules.....	196
Folk, Harold, president, United Buying Service, letter to Senator Tunney of November 5, 1973.....	42

Ink, Dwight A., Acting Administrator, General Services Administration, letter to Senator Tunney of September 21, 1973-----	Page 66
Kauper, Thomas E., Assistant Attorney General, Antitrust Division, U.S. Department of Justice, address before New York State Bar Association, January 24, 1973-----	174
Perlsweig, Leon, coauthor, "How to Fight Your Case in Small Claims Court," letter to subcommittee staff member, Matthew Schneider, dated October 24, 1973-----	36
Tunney, Hon. John V., U.S. Senator, letter to Harold Folk, president, United Buying Service, dated October 10, 1973-----	41
Whitmer, Leslie G., director, Kentucky Bar Association, letter to members of Kentucky Bar Association, dated September 25, 1973, rescinding suggested fee schedules-----	195
Wilson, Bruce B., Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, remarks before Pennsylvania Bar Association Conference of County Bar Officers, March 25, 1972-----	179

STATUTES

15 U.S.C. §1, Sherman Act-----	184
--------------------------------	-----

JUDICIAL AND ADMINISTRATIVE MATERIALS

<i>Goldfarb v. Virginia State Bar</i> , 355 F. Supp. 491 (E.D. Va. 1973)-----	93
<i>Goldfarb, et al., v. Virginia State Bar</i> , Civ. No. 73-1274 (4th Cir.) (appeal pending); brief for appellant, Goldfarb-----	105
<i>Goldfarb, et al., v. Virginia State Bar</i> , Civ. No. 73-1274 (4th Cir.) (appeal pending); brief for appellee, Virginia State Bar-----	121

ARTICLES

Arnould and Corley, <i>Fee Schedules Should be Abolished</i> , 57 A.B.A.J. 655 (1971)-----	185
Book Review on: Christensen, "Lawyers for People of Moderate Means"--- 5 VALP. U.L. REV. 683 (1971)-----	73
Ferren and Synder, <i>Antitrust and Ethical Aspects of Lawyers' Minimum Fee Schedules</i> , 7 REAL PROPERTY PROBATE AND TRUST JOURNAL, 726 (1972)-----	154
Note, <i>A Critical Analysis of Bar Association Minimum Fee Schedules</i> , 85 HARV. L. REV. 971 (1972)-----	197
Note, <i>The Wisconsin Minimum Fee Schedule, A Problem of Antitrust</i> , 1968 WISC. L. REV. 1237 (1968)-----	220
Ronald Kessler, "The Settlement Squeeze—II," Reprinted from The Washington Post, Monday, January 10, 1972-----	66

PROPOSED LEGISLATION

S. 2101, a bill to amend the Truth in Lending Act to protect consumers against unfair billing practices, and for other purposes, viz: Add the following new title at the end thereof. Intended to be introduced by Senator Proxmire, 93d Cong., 1st sess.-----	78
S. 2228, a bill to provide for greater disclosure of the nature and costs of real estate settlement services, to eliminate the payment of kickbacks and unearned fees in connection with settlement services provided in federally related mortgage transactions and for other purposes. Introduced by Senator Brock, 93d Cong., 1st sess.-----	79

PART II

GOVERNMENT REGULATION AND SUBSIDY
OF LEGAL FEES

HEARING DAYS

Monday, October 1, 1973-----	245
Tuesday, October 2, 1973-----	443

TESTIMONY

STATEMENT OF SUBCOMMITTEE MEMBERS

Monday, October 1, 1973

Tunney, Hon. John V., U.S. Senator for California, chairman, Subcommittee on Representation of Citizen Interests-----	245
Cook, Hon. Marlow W., U.S. Senator for Kentucky-----	246

Tuesday, October 2, 1973

Tunney, Hon. John V., U.S. Senator for California, chairman, subcommittee on Representation of Citizen Interests.....	Page 443
-----------------------------------------------------------------------------------------------------------------------	-------------

WITNESSES

Bonner, Raymond T., attorney, Public Citizen, Inc., contributing author, "The Nader Report on Vietnam Veterans and the Veterans Administration".....	504
Corcoran, John J., general counsel, Veterans Administration; accompanied by: Howard Denney, assistant general counsel; and James Taffe, Compensation and Pension Service, Veterans Administration.....	444
Denham, Glenn W., president, Kentucky Bar Association.....	372
Hechler, Hon. Ken., U.S. Representative from West Virginia.....	247
Mattingly, Charles E., deputy director, National Legislative Commission, American Legion; accompanied by: Edward Golembieski, director, Veteran Affairs and Rehabilitation, American Legion.....	495
Nelson, Robert, director, Legislative Department, United Mine Workers, testifying on behalf of Arnold Miller, president, United Mine Workers of America.....	328
Nussbaum, Harold J., attorney at law, Washington, D.C.....	463
Popick, Bernard, director, Bureau of Disability Insurance, Social Security Administration; accompanied by: Joan Hutchinson, Deputy Assistant Secretary For Welfare Legislation; Hugh A. Meade, Jr., chief, Miners Benefits Branch; and Gerald G. Altman, Jr., chief, Cash Benefits Branch, Social Security Division, Office of the General Counsel, Department of Health, Education, and Welfare.....	289
Smith, Cawood, attorney at law, Harlan, Ky.....	259
Supplemental Statement.....	286
Snyder, Nancy, director, Division of Coal Mine Workers' Compensation, Office of Workmen's Compensation Programs, Department of Labor; accompanied by: James Johnston, associate solicitor, Division of Employee Benefits, Department of Labor.....	299
Yocum, James R., Commissioner of Labor, Commonwealth of Kentucky; accompanied by: Robert Hawkins, Chief Counsel of Special Fund.....	347
Addendum.....	360

STATEMENTS SUBMITTED FOR THE RECORD

Coburn, Fred, miner, Hippo, Ky.....	320
Crum, Oscar, miner, Arkansas Creek, Ky.....	320
Greene, Hon. Harold H., Chief Judge, Superior Court of the District of Columbia.....	662
Hewitt, James F., Federal Public Defender, Northern District of California, San Francisco, Calif.....	699
Hubbard, Marion, miner, Manchester, Ky.....	326
Mullins, Daniel, miner, Drift, Ky.....	317
Rosen, Sol Zalel; attorney at law, Washington, D.C.....	688
Stover, Francis, on behalf of Veterans of Foreign Wars.....	492
Worthington, Bill, president, Kentucky Black Lung Association.....	327

EXHIBITS AND APPENDIX

DOCUMENTS AND CORRESPONDENCE

The Americal Legion, Fact Sheet on Judicial Review of Veterans Administration Decisions.....	503
Application for Adjustment of Claim, Form No. 11, Kentucky Workmen's Compensation Board.....	368
Application for Program of Education or Training (under ch. 34, title 38, U.S.C.).....	460
Black Lung Task Force, Final Report and Recommendations, prepared by Public Systems, Inc., Louisville, Ky.....	363
Comptroller General of the United States, letter to the Hon. Rowland F. Kirks, Director, Administrative Office of the U.S. Courts.....	675
CJA Voucher Form 20.....	711

Davis, Professor Frederick, past chairman, ABA Section of Administrative Law, Special Committee on Veterans, letter to Senator Tunney, dated September 23, 1973-----	Page 520
Greene, Hon. Harold H., Chief Judge, open letter to members of the bar, dated July 26, 1973-----	685
Hess, Arthur E., Acting Commissioner of Social Security, letter to Representative Hechler (D-W. Va.), dated August 14, 1973; attached report concerning the black lung benefits program-----	257
Hess, Arthur E., Acting Commissioner of Social Security, letter to Representative Hechler (D-W. Va.), dated August 21, 1973; attached survey, Black Lung Fee Activity of Attorney's from West Virginia-----	258
Hess, Arthur E., Acting Commissioner, Social Security Administration, letter to Senator Tunney, dated September 20, 1973-----	311
"Qualification and Competence of Claims Representatives," The Attorney General's Committee on Administrative Procedure, Monograph No. 2, The Veterans Administration—p. 83-----	445
"Summary Description of Black Lung Benefits Program," U.S. Department of Labor, Employment Standards Administration-----	313
Tracey, John P., associate director, Washington, D.C., office of the American Bar Association, letter to Louis G. Davidson, attorney at law, dated September 24, 1973-----	530
Veterans Administration Regulations, Compensation and Pension Transmittal Sheet 494-----	451

STATUTES

18 U.S.C. § 3006A—Criminal Justice Act-----	657
38 U.S.C. § 211(a)—Decisions of the Veterans Administrator shall be final-----	519
38 U.S.C. § 3404(c)—Limitation on attorneys' fee in veterans cases-----	519
Changes in existing law made by the Black Lung Benefits Act of 1972-----	392

JUDICIAL & ADMINISTRATIVE MATERIALS

<i>Argersinger v. Hamlin</i> , 407 U.S. 25 (1972)-----	713
Decision of the Controller General B-156932-----	679
<i>Gendron v. Richardson et al.</i> , Civ. No. 73-2241 EC (C.D. Cal. filed September 21, 1973); Memorandum of law in support of complaint to declare 38 U.S.C. § 3404(c)(2) unconstitutional-----	525
<i>Kamenisch et al. v. United States et al.</i> , Civ. No. 1868-73 (D.D.C. filed October 4, 1973)-----	695
<i>Rodulfa v. United States</i> , 461 F. 2d 1240 (D.C. Cir. 1972)-----	473
<i>Rosen v. Greene</i> , Civ. No. _____ (D.D.C. filed _____) Complaint for Declaratory Relief and for Injunctive Relief-----	693
<i>Staub v. Johnson</i> , Civ. No. 1640-73 (D.D.C. filed _____) Complaint for Declaratory Judgment and Injunction—seeking to declare 38 U.S.C. § 3404(c)(2) unconstitutional-----	522
<i>United States v. Thompson</i> , Crim. No. 73-71 (decided July 31, 1973 D.D.C.)-----	758
<i>United States v. Walker</i> , Crim. No. 363-66 (filed _____)-----	661

ARTICLE

Davis, <i>Veterans' Benefits, Judicial Review and the Constitutional Problems of "Positive Government,"</i> 39 IND. L. J. 183 (1964)-----	612
Note: <i>Judicial Review and the Government Recovery of Veterans' Benefits</i> , 118 U. PA. L. REV. 288 (1969)-----	602
Starr, et al., "The Impassive V.A."—Reprinted from <i>Troubled Peace: An Epilogue to Vietnam—The Nader Report on Vietnam Veterans and the Veterans Administration</i> -----	517
Don Stillman, "Being In The Right Place At The Right Time," Reprinted from <i>U.M.W. Journal</i> , August 1-15, 1973-----	340
D. Schwartz and S. Jacoby, <i>Attorneys' Fees in Government Litigation</i> , 16-5 PRACTICAL LAWYER 45 (1970)-----	572
Strickland, "Limitations on Attorneys' Fees Under Federal Law," American Bar Foundation, 1961-----	533

PROPOSED LEGISLATION

S. 2008—A bill to strengthen state workers' compensation programs, and for other purposes. Introduced by Senator Williams, 93d Cong., 1st sess-----	Page 412
S. 2027—A bill to amend title 38 of the United States Code to make more equitable the procedures for determining eligibility for benefits under the laws administered by the Veterans' Administration, and for other purposes. Introduced by Senator Mondale, 93d Cong., 1st sess-----	589
H.R. 1761—A bill to amend the black lung benefit provisions of the Federal Coal Mine Health and Safety Act of 1969 to delete the provisions for offset of black lung benefits against State workmen's compensation, unemployment compensation, and disability insurance benefits. Introduced by Representative Hechler, 93d Cong., 1st sess-----	406
H.R. 8835—A bill to deny reimbursement under the black lung program on account of attorney's fees arising out of State workmen's compensation case. Introduced by Representative Dent, 93d Cong., 1st sess-----	410
H.R. 8838—A bill to limit the reimbursement of attorney's fees under black lung program. Introduced by Representative Erlenborn, 93d Cong. 1st sess-----	408
H.R. 8846—A bill to amend title 38 of the United States Code to make more equitable the procedures for determining eligibility for benefits under the laws administered by the Veterans Administration, and for other purposes. Introduced by Representative Koch, 93d Cong., 1st sess-----	596

PART III

COURT AWARDS OF ATTORNEYS' FEE TO THE PREVAILING PARTY IN LITIGATION

HEARING DAYS

Thursday, October 4, 1973-----	787
Friday, October 5, 1973-----	1115

TESTIMONY

STATEMENTS OF SUBCOMMITTEE MEMBERS

Thursday, October 4, 1973

Tunney, Hon. John V., U.S. Senator from California, chairman, Subcommittee on Representation of Citizen Interests-----	787
------------------------------------------------------------------------------------------------------------------------	-----

Friday, October 5, 1973

Tunney, Hon. John V., U.S. Senator from California, Chairman, Subcommittee on Representation of Citizen Interests, Closing Remarks---	1253
---------------------------------------------------------------------------------------------------------------------------------------	------

WITNESSES

Bamberger, Clinton, Dean of Catholic University Law School, Washington, D.C., appearing on behalf of National Legal Aid and Defender Organization-----	843
Bell, L. Graeme III, staff attorney, Native American Rights Fund-----	806
Chase, Barry, president, Washington Council of Lawyers, Washington, D.C.-----	1244
Derfner, Armand and Mary Frances, Lawyers' Committee for Civil Rights Under Law, Washington, D.C.-----	854
Godown, Richard, general counsel, National Association of Manufacturers, Washington, D.C.; accompanied by Simon Tucker-----	1115
Flannery, Dennis, attorney at law, Washington, D.C.-----	831
Kline, J. Anthony, attorney, Public Advocates, Inc., San Francisco, Calif.-----	788
Mause, Philip J., attorney at law, Washington, D.C.-----	1202
Onok, Joseph N., director, Center for Law and Social Policy, Washington, D.C.-----	849
Roberts, Sylvia, attorney at law, Baton Rouge, La.; chairperson, National Organization for Women, Legal Defense Fund-----	1128

STATEMENTS SUBMITTED FOR THE RECORD

Lloyd, Frank W., executive director, Citizens' Communication Center, Washington, D.C.-----	Page 1254
Roberts, Sylvia, chairperson, National Organization of Women, Legal Defense Fund-----	1137
Sands, Dallas C., professor of law, University of Alabama-----	1263

EXHIBITS AND APPENDIX

DOCUMENTS AND CORRESPONDENCE

<i>Attorneys' Fees in Pro Bono Publico Cases</i> —A Compilation of Federal Court Cases, prepared by Mary Frances Derfner, Lawyers' Committee for Civil Rights (August 1972) (abridged)-----	862
Thomas, Jack W., Public Citizen, Inc., letter to Joseph A. Tedesco, Miscellaneous and Special Provisions Tax Division dated (June 22, 1973)-----	1521
Tunney, Hon. John V., open letter to the delegates, Regional Conference of State Bar Presidents, dated October 20, 1973-----	1544

STATUTES

28 U.S.C. § 2412—Limitation on Attorneys' Fees Awards Against Federal Officers-----	1266
----------------------------------------------------------------------------------------	------

Providing for or Requiring Court Awards of Attorneys' Fees

7 U.S.C. § 210(f)—Packers and Stockyards Act, § 309(f)-----	1267
7 U.S.C. § 499(g)—Perishable Agricultural Commodities Act, § 7(b)-----	1267
15 U.S.C. § 15—Clayton Act, § 4-----	1268
15 U.S.C. § 77k(e)—Securities Act of 1933, § 11c-----	1268
15 U.S.C. § 77www(a)—Trust Indenture Act § 323(a)-----	1269
15 U.S.C. § 78i(e)—Securities Exchange Act of 1934, § 9(e)-----	1269
15 U.S.C. § 78r(a)—Securities Exchange Act of 1934, § 18(a)-----	1270
15 U.S.C. § 1640—Truth-in-Lending Act § 130-----	1270
17 U.S.C. § 116—Copyright Act-----	1270
18 U.S.C. § 1964(c)—Organized Crime Control Act of 1970, § 901(a)-----	1271
20 U.S.C. § 1617—Education Amendments of 1972-----	1271
28 App. U.S.C. Rule 37(a)—Failure to make Discovery-----	1271
28 App. U.S.C. Rule 37(e)—Failure to make Discovery-----	1272
29 U.S.C. § 107—Norris-LaGuardia Act § 7-----	1272
29 U.S.C. § 216(b)—Fair Labor Standards Act, § 16(b)-----	1273
29 U.S.C. § 501(b)—Labor-Management Reporting and Disclosure Act-----	1273
35 U.S.C. § 285—(Patent Infringement)-----	1274
38 U.S.C. § 1822—Servicemen's Readjustment Act-----	1274
42 U.S.C. § 1857h-2(d)—Clean Air Amendments of 1970 § 304(d)-----	1275
42 U.S.C. § 2000a-3(b)—Civil Rights Act of 1964, Title II (Public Accom- modations Subchapter)-----	1275
42 U.S.C. § 2000e-5—Civil Rights Act of 1964, Title VII (Equal Employ- ment Opportunities Subchapter)-----	1275
42 U.S.C. § 3612(c)—Fair Housing Act of 1968-----	1275
42 U.S.C. § 4911—Environment Noise Control Act of 1972-----	1276
45 U.S.C. § 153(p)—Railway Labor Act, § 3-----	1276
46 U.S.C. § 1227—The Merchant Marine Act of 1936-----	1276
47 U.S.C. § 206—Communications Act of 1934-----	1277
49 U.S.C. § 8—Interstate Commerce Act-----	1277
49 U.S.C. § 16(2)—Interstate Commerce Act, § 16-----	1277
49 U.S.C. § 908(b)—Interstate Commerce Act (Water Carriers)-----	1278

JUDICIAL AND ADMINISTRATIVE MATERIALS

<i>Cooper v. Allen</i> , 407 F.2d 836 (5th Cir. 1972)-----	1321
<i>Hall v. Cole</i> , 412 U.S. 1 (1973)-----	1305
<i>Kiser v. Miller</i> , et al. Civ. No. 2599-70 (decided August 29, 1973 D.D.C.)-----	1340
<i>La Raza Unida v. Volpe</i> , et al, 57 F.R.D. 94 (N.D. Cal. 1972)-----	1326
<i>Lindy Bros. Builders et al. v. American Radiator and Standard</i> Civ. No. 72-1647-1648 (3rd Cir. decided October 31, 1973)-----	1371
<i>Mills v. Electric Auto-Lite</i> , 396 U.S. 375 (1970)-----	1279
<i>National Resources Defense Council et al. v. EPA</i> , Civ. No. 72-1219 (decided October 1, 1973, 1st Cir.)-----	1348

<i>Northcross et al. v. Bd. of Ed. of The Memphis City Schools et al.</i> 397 U.S. 232 (1973)-----	Page 1302
<i>Pyramid Lake Paiute Tribe of Indians v. Morton</i> , Cir No. 2506-07 (decided D.D.C.); Memorandum of points and authorities in support of motion for attorneys fees-----	814
<i>Sierra Club v. Lynn</i> , Civ. No. SA 72 CA 77 (decided Aug. 24, 1973, W.D. Tex)-----	1363
<i>Stanford Daily v. James Zurcher, et al.</i> , Civ. No. 71-912-RFP (decided August 10, 1973, N.D. Cal.)-----	1334
<i>Weeks v. So. Bell</i> , Civ. No. 443; (decided December 1, 1971, S.D. Ga.) Judgment on Motions for Counsel Fees and Expenses-----	1146
<i>Weeks v. So. Bell</i> 408 F. 2d 228 (5th Cir. 1969)-----	1139
<i>Weeks v. So. Bell</i> , 467 F. 2d 95 (5th Cir. 1972), rehearing denied (1973); Brief for appellant-----	1149
<i>Weeks v. So. Bell</i> , 467 F. 2d 95 (5th Cir. 1972), rehearing denied (1973); Brief <i>Amicus Curiae</i> on behalf of NAACP-----	1158
<i>Weeks v. So. Bell</i> , 467 F. 2d 95, (5th Cir. 1972), rehearing denied (1973); Brief <i>Amicus Curiae</i> on behalf of NOW Legal Defense Fund Inc.-----	1163
<i>Weeks v. So. Bell</i> , 467 F. 2d 95 (5th Cir. 1972), rehearing denied (1973); brief <i>Amicus Curiae</i> on behalf of Western Region NAACP and Mexican-American Legal Defense and Educational Fund-----	1168
<i>Weeks v. So. Bell</i> , 467 F. 2d 95 (5th Cir. 1972), rehearing denied (1973); brief <i>Amicus Curiae</i> on behalf of Women's Equity Action League-----	1173
<i>Weeks v. So. Bell</i> , 467 F. 2d 95 (5th Cir. 1972), rehearing denied (1973)-----	1179
<i>Weeks v. So. Bell</i> , 467 F. 2d 95 (5th Cir. 1972), rehearing denied (1973); brief for appellants in support of rehearing-----	1183
<i>Weeks v. So. Bell</i> , 467 F. 2d 95 (5th Cir. 1972), rehearing denied (1973); brief <i>Amicus Curiae</i> of NAACP in support of rehearing-----	1192
<i>Weeks v. So. Bell</i> , 467 F. 2d 95 (5th Cir. 1972), rehearing denied (1973); brief <i>Amicus Curiae</i> of Western Region, NAACP and Mexican-American Legal Defense and Educational Fund in support of rehearing-----	1195
<i>Weeks v. So. Bell</i> , 467 F. 2d 95 (5th Cir. 1972), rehearing denied (1973); brief of <i>Amicus Curiae</i> on behalf of Women's Equity Action League in support of motion for rehearing-----	1202

ARTICLES

Baird, <i>Charitable Deductions for Pro Bono Publico Professional Services: An Updated Carrott and Stick Approach</i> , 50 TEX. L. REV. 441 (1972)---	1537
Ehrenzeig, <i>Reimbursement of Counsel Fees and the Great Society</i> , 54 CALIF. L. REV. 792 (1966)-----	1388
Note: <i>The Allocation of Attorneys' Fees after Mills v. Electric Auto-Lite Co.</i> , 38 U. CHI. L. REV. (1971)-----	1397
Note: <i>Awarding Attorneys' Fees to the "Private Attorney General": Judicial Green Light to Private Litigation in the Public Interest</i> , 24 HAST. L. J. 733 (1973)-----	1455
Nussbaum, <i>Attorneys' Fees In Public Interest Litigation</i> , 48 N.Y.U.L. REV. 301 (1973)-----	1418
McLaughlin, <i>The Recovery of Attorneys' Fees: A New Method of Financing Legal Services</i> , 40 FORD L. REV. 761 (1972)-----	1493
Mause, <i>Winner Takes All: A Re-examination of the Indemnity System</i> , 55 IOWA L. REV. 26 (1969)-----	1213
Wolhowe, Cathe, <i>Environmental Groups Face Fund Cut</i> , from <i>The Washington Post</i> , Sept. 28, 1973-----	1252

PROPOSED LEGISLATION

S. 973—To amend sec. 2412 of title 28, United States Code, to provide for the recovery of attorney's fees and expenses in certain actions brought by or against the United States. Introduced by Senator Hollings, 93d Cong., 1st sess-----	1278(a)
---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------

PART IV

PUBLIC COMMENTS

BAR ASSOCIATIONS

The American Bar Association, Smith, Chesterfield, president-----	1550
Cannon 2, American Bar Association, Code of Professional Responsibility-----	1549

STATE BAR ASSOCIATIONS

	Page
Alabama State Bar, Nachman, M. Roland, Jr., president.....	1553
Arizona State Bar, Segal, Richard A., president.....	1554
Arkansas State Bar, West, James E., president.....	1556
The Colorado Bar Association, Williams, Anthony W., president.....	1559
The Bar Association of the District of Columbia, Canfield, Austin F., Jr., president.....	1562
State Bar of Georgia, Adams, F. Jack, president.....	1563
Illinois State Bar Association, Sutter, William P., president.....	1573
The Iowa State Bar Association, Tomasek, F. W., president.....	1576
Maryland State Bar Association, Walker, Thomas J., Jr., chairman, Economic Committee.....	1580
Massachusetts Bar Association, Fisher, Frederick G., Jr., president.....	1585
State Bar of Michigan, Smith, Carl, Jr., president.....	1587
Minnesota State Bar Association, Halverson, Gene W., president.....	1592
The Montana Bar Association, Loble, Henry, president.....	1599
Nebraska State Bar Association, Welch, Harry L., president.....	1603
Ohio State Bar Association, Porter, Walter A., president.....	1605
Pennsylvania Bar Association, Fuchs, William J., Esq., chairman, Committee on Availability of Legal Services.....	1608
State Bar of Texas, Jeffers, Leroy, president.....	1617
The State Bar of South Dakota, Oviatt, Ross H., president.....	1640
Tennessee Bar Association, Dodson, Harlan, president.....	1645
Utah State Bar, Stark, LaVar E., president.....	1647
Washington State Bar Association, Cone, Cleary S., president.....	1652
Wyoming State Bar, Morgan, Thomas, president.....	1656

CALIFORNIA LOCAL BAR ASSOCIATIONS

Century City Bar Association, Hartley, J., president.....	1659
Del Norte County Bar Association, de Solenni, Mario E., president.....	1682
Los Angeles County Bar Association, Markey, Christian E., Jr., president elect.....	1664
Marin County Bar Association, Shaw, Leonard, president.....	1680
Palo Alto Area Bar Association, Mansfield, Richard G., president.....	1681
San Diego County Bar Association, Newburn, John L., president.....	1683
Santa Maria-Lompoc Valley Bar Association, Lang, Thomas A., president.....	1686
Sonoma County Bar Association, Mackey, Robert W., president.....	1688
Southwest Los Angeles Bar Association, Felthouse, Jack C. past president.....	1690
Ventura County Bar Association, Peck, William L., Esq., chairman.....	1692
Yuba-Sutter Bar Association, Ithurburn, Fred B., president.....	1694

SAMPLING OF COMMENTS FROM GENERAL PUBLIC

East Douglas, Mass., August 11, 1973.....	1695
Boston, Mass., August 15, 1973.....	1697
Marina, Calif., September 10, 1973.....	1699
Indio, Calif., September 17, 1973.....	1708
San Diego, Calif., September 18, 1973.....	1710
Houston, Tex., September 18, 1973.....	1711
Del Mar, Calif., September 23, 1973.....	1712
Cambridge, Mass., September 24, 1973.....	1713
Rochester, N.Y., September 26, 1973.....	1715
Arlington, Va., September 26, 1973.....	1718
Los Angeles, Calif., September 29, 1973.....	1720
Malden, W. Va., October 2, 1973.....	1724
Los Angeles, Calif., October 2, 1973.....	1743
Milwaukee, Wis., October 4, 1973.....	1745
Bessemer, Ala., October 8, 1973.....	1771
Raleigh, N.C., October 13, 1973.....	1772
Jamestown, Calif., October 13, 1973.....	1773
Baton Rouge, La., October 15, 1973.....	1774
Shawnee, Okla., October 29, 1973.....	1776

LEGAL FEES

THURSDAY, OCTOBER 4, 1973

U.S. SENATE,
SUBCOMMITTEE ON REPRESENTATION OF CITIZEN INTERESTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:45 a.m., in Room 2228, Dirksen Senate Office Building, Senator John V. Tunney (chairman) presiding.

Present: Senator Tunney (presiding).

Also present: Jane Frank, chief counsel; Neil Levy, assistant counsel; Joseph Dawahare, minority counsel; Ann Hennigan, chief clerk; and Matthew Schneider, staff assistant.

STATEMENT OF HON. JOHN V. TUNNEY, SENATOR FROM CALIFORNIA, CHAIRMAN, SUBCOMMITTEE ON REPRESENTATION OF CITIZEN INTERESTS

Senator TUNNEY. Today and tomorrow, we shift our focus to court awards of attorneys' fees—a new method of financing consumer, environmental, and other public interest law suits. Congress has enacted needed legislation affording citizens important rights in many areas. All too often, however, not enough attention has been given to the problem of enforcing these rights. Without effective enforcement, rights are but a hollow declaration lacking any substantive effect.

Many of these new laws provide for citizen suits and judicial review. But to take advantage of such provisions, attorneys are needed. Often, criminal and civil penalties are mandated, but here again, enforcement can be difficult when it puts the Attorney General in the position of being required to sue the Federal officer accused of violating the Federal statute. In this latter situation, the Attorney General usually ends up defending the Federal officer.

Where are the attorneys to enforce these statutory rights? The legal services organizations are understaffed and cannot assist citizens with incomes over the poverty level. Other private attorneys are frequently too expensive for the average citizen. Until recently, for most citizens, there was no one to enforce these rights. In the last 5 years, however, as a result of congressional and Supreme Court encouragement, a new breed of attorneys is emerging—often hailed as private attorneys general.

These private attorneys general are being encouraged to bring lawsuits in the public interests by an extremely important mechanism, known as "fee-shifting." In some instances, both Congress and the courts have required that the burden of paying the winning party's attorney's fees must be shifted to the losing party who was found to have wrongfully denied others their legal or constitutional rights. This is done despite the normal practice of requiring each party—win or lose—to pay his own attorney. When an attorney is able to collect fees if he prevails, or substantially prevails, he can take cases on behalf of average-income citizens and vindicate their rights. In view of the tenuous nature of other public and private financing for these attorneys, "fee-shifting" becomes even more important.

In these 2 days of hearings, the subcommittee will attempt to ascertain whether "fee-shifting" affords representation to otherwise unrepresented interests, whether some restriction or encouragement of the development is needed, and what place, if any, there is for legislation in this area.

Over the course of these 2 days we will hear from some of the attorneys who have represented various previously unrepresented interests and have sought or been awarded fees. We will hear about legal impediments to "fee-shifting", such as section 2412 of title 28 of the United States Code, which prohibits court awards of fees to the prevailing party in a suit against the Federal Government unless such awards are specifically authorized by statute, and about ways in which those impediments might be changed. We will hear from the National Association of Manufacturers about the views of business interests concerning these developments. We will hear from a law professor, and private practitioner who has studied the impact of these developments. We had also hoped to hear from judges about how they view these developments, but because all those who have been active in this area have litigation on the subject pending before them, their appearance before us, at this time, was viewed inappropriate.

It may well be that "fee-shifting" affords the best means of ensuring that rights provided by the Constitution and the Congress are not taken away by the harsh reality of the high costs of litigation.

Our first witness is Mr. J. Anthony Kline, attorney, Public Advocates, Inc., San Francisco, Calif.

I would like to ask witnesses if possible to try and restrict their opening remarks so that we will have the opportunity to question you. It would be most helpful for the committee because your statement will be made a part of the record, Mr. Kline, and it is a very extensive statement, and a good one, but we won't be able to question you on it if you read the whole thing.

STATEMENT OF J. ANTHONY KLINE, ESQ., ATTORNEY, PUBLIC ADVOCATES, INC., SAN FRANCISCO, CALIF.

Mr. KLINE. I am going to address my remarks to court ordered attorney fees in "public interest litigation". A lot of people feel about public interest litigation the way Justice Stewart feels about

pornography, they don't know how to define it, but they know it when they see it.

But I think we must attempt some definition. I believe public interest litigation generally conforms to three criteria. First, the issue or issues, involved in the litigation are currently regarded as being of extreme importance and the importance of the issues can be inferred from legislative action or from the very fundamental nature of the right at stake.

The second criteria is that final judgment in the case will affect not only the named plaintiffs but also a substantial element of the public.

And the third criteria is that the litigation must be commenced by private plaintiffs rather than the Government.

As you pointed out, Mr. Chairman, the courts have recognized the need to facilitate this type of litigation, and so has the Congress.

There are, in my view, a number of reasons why litigation such as this is discouraged and why competent counsel are often unavailable to plaintiffs. The first reason is that these suits are almost by their nature time-consuming, complex and expensive; and damages are not sought from which attorneys' fees can be reimbursed.

Furthermore, those with standing to commence these suits are very often poor people without the financial means to support expensive litigation. I should point out, in this connection, that we cannot presume that the OEO legal services program is in any position to represent the legal needs of the vast majority of low-income people in this country.

A former Director of OEO, Mr. Carlucci, has estimated that the legal services program does not even begin to meet the legal needs of more than 28 percent of the people who are within OEO guidelines. OEO guidelines confine legal services lawyers to representation of only the hardcore poor. In the State of California, for example, legal services lawyers cannot represent a family of four with an annual income that exceeds \$4,000; the wage earner and middle class are thus deprived of representation by the OEO legal services program.

But there is an additional reason why it is very difficult for citizens to maintain public interest litigation, and it is a reason that is not widely appreciated. That is that any individual's personal interest in bringing litigation of this type is almost always diffused in the public interest.

Take, for example, a proposed suit to challenge a federally assisted highway project believed to violate various environmental statutes or statutes designed to protect residents from sudden displacement. And let us assume, as is not usually the case, that the people who will be affected by the highway project are not poor people; let's assume they are rich people. An individual who is going to be affected by that highway will go to a lawyer and say "I think this highway is a mistake and I want you to tell me whether you think you can enjoin it on legal grounds." And the lawyer may investigate the matter and conclude that the project does violate the law and can be enjoined. He will undoubtedly advise his client, however, that his fee will be in the neighborhood of at least \$25,000 to file a class action suit against the Secretary of Transportation, the Federal Highway

Administration and the State highway department. And, the client may well say to himself "why should I be out of pocket \$25,000 to vindicate, not my own personal interest, but the concomitant interests of 10,000 or 20,000 other people who are also going to be affected." In other words, because public, rather than private, interests involved, very few citizens who can afford to retain and pay an attorney would be willing to actually do so.

Because of the disincentives to public interest instigation I have just briefly outlined, the courts have in the last several years taken the position that fees should be awarded in certain types of public interest cases where various criteria are met, and I would like to just quote one statement from an opinion in a case decided last year in California by United States district judge Robert F. Peckham. The name of the case is *La Raza Unida v. Volpe*, [57 F.R.D. 94 (N.D. Cal. 1972)]¹ and it is much like the hypothetical highway case I just described; this is what Judge Peckham had to say:

[E]xhortations towards citizen participation can sound somewhat hollow against the background of the economic realities of vigorous litigation. In many "public interest" cases only injunctive relief is sought, and the average attorney or litigant must hesitate, if not shudder at the thought of "taking on" an entity such as the California Department of Highways, with no prospect of financial compensation for the efforts and expenses rendered. The expense of litigation in such a case poses a formidable, if not insurmountable, obstacle.

The only public entities that might have brought suit in this case were named as defendants in this action and vigorously opposed plaintiffs' contentions. Only a private party could have been expected to bring this litigation, and yet a private party is least able to bear the tremendous economic burdens. To force the private litigants to bear their own costs here would be tantamount to a penalty, and it seems somewhat inequitable to punish litigants who have policed those charged with implementing and following Congressional mandates. Hence, the fact that only a private party could be reasonably expected to bring this action is one additional factor supporting the awarding of attorneys' fees in this case [*Id.* at 101].

I should point out that this rule of awarding attorney fees in public interest cases is still, I believe, the exception rather than the rule; although there is a discernable judicial trend to adopt the view articulated by Judge Peckham.

As a general proposition, attorney fees are still not recoverable as costs in the United States. Although, as you have pointed out, the Congress has acted in this area with respect to certain statutes.

There are approximately 20 Federal statutes² in which attorneys' fees are prescribed or authorize the courts in their discretion to award fees. But with a few exceptions, such as titles II and VII of the Civil Rights Act of 1964 and the Clean Air Act, the vast majority of those statutes are in the commercial area. The Agriculture Perishable Commodities Act, the Railway Labor Act and the Clayton Act, are a few examples. In short, although Congress has acted with respect to fees, it has not acted in areas of the law that are of particular concern to public interest lawyers; and the problem the courts have had to struggle with in recent years is finding grounds upon which to award fees in legal areas in which the Congress has been silent on this issue.

¹ Set forth in full at page 1326.

² Set forth in full at page 1266-1278.

The rule of awarding attorneys' fees in public interest cases has been stated by Judge Peckham in the case I quoted from a moment ago. Judge Peckham states the rule as follows:

* * * [W]henver there is nothing in a statutory scheme which might be interpreted as precluding it, a "private attorney general" should be awarded attorneys' fees when he has effectuated a strong congressional policy which has benefited a large class of people, and where further the necessity and financial burden of private enforcement are such as to make this award essential [57 F.R.D. at 98].

In just the last 20 years this rule has been employed to award fees in a vast array of public interest cases; voting rights cases, suits challenging illegal treatment of mental patients, prison reform cases, environmental cases, cases involving racial discrimination in housing, suits involving discrimination against welfare recipients, and suits involving the breach by a union of its duty of fair representation. In all of those cases the Congress had not in the statute involved specifically stated that fees might be awarded. Moreover, in all of those cases the courts emphasized that the defendants against whom fees were being assessed had not acted in bad faith. That is important, because in the past one of the major judge made exceptions to the general rule against attorney fees was where the losing party had acted in bad faith.

Let me just conclude my remarks with a few observations.

First, I do not believe that adoption of the private attorney general rule by the appellate courts and perhaps by the Congress will have the effect of inundating the courts with frivolous litigation. First of all, the courts have a great deal of discretion under the rule; and even where a plaintiff prevails in a public interest case he cannot necessarily be assured that he will receive his fees. Where a plaintiff files a frivolous suit, he certainly would not be entitled to fees. In any event, the courts already have the power to award fees against a plaintiff who has acted frivolously or brought a suit to harass, as some have suggested public interest lawyers would do.

My final suggestion pertains to section 2412 of title 28 of the U.S. Code. I believe that statute, which restricts the ability of the courts to award attorney fees against Federal defendants, has probably had the most significant chilling effect on the development of this entire rule.

Let me point out, first, that in a majority of public interest suits the Federal Government is a defendant. This is true not only in the areas of welfare, housing and transportation, but as well in connection with environmental and consumer matters. The Federal agencies that are sued in these cases are always represented by the Justice Department in Washington or by the U.S. Attorneys out in the field. Secondly, there is an enormous difficulty in maintaining litigation against the Federal Government precisely because of the enormous legal resources at the disposal of the government. A third reason for modifying section 2412 is that the successful litigation of a public interest suit against the government almost always results in the performance by the plaintiff of a public service. A final reason why the Federal Government should be liable for fees, and perhaps the most compelling, and that is that the Federal Government is in the best position to allocate the expense of the litigation among all those who benefited.

The courts have in the past developed an exception to the rule against fees referred to as the "common fund doctrine." This exception is usually applied in derivative suits brought by stockholders against management and suits by beneficiaries of a trust against a trustee where the litigation creates a common fund for the benefit of all stockholders or all trust beneficiaries. In those cases the courts have held defendants liable for fees because they are in a position to allocate the expense of the litigation among all of the stockholders or beneficiaries.

Similarly, I think the Federal Government, supported by the people through their taxes, is in a position to allocate the costs among all citizens who are the beneficiaries of litigation that vindicates the public interest. I think a very persuasive argument can be made that the public, through the Federal Government, ought to bear the expense of the litigation.

Senator TUNNEY. Your statement is very complete and we have read it and I would like to question you on some aspects. In the United States we have always have the rule that generally a winning plaintiff must pay his own attorneys' fees, and I wonder if other countries have the same rule, or do other countries shift the burden of attorneys' fees to the losing party?

Mr. KLINE. As recently pointed out by the U.S. Supreme Court in *Hall v. Cole*, [93 S. Ct. 1943 (1973)]¹ the American rule is unique. In fact the only other country I know of—I am including civil law as well as common law countries—in which attorney fees are not normally recovered by the winning party is Belgium. Outside of Belgium, there is so far as I am aware no other country that has a rule such as that which prevails in this Nation. Even in Britain, from whence we get our legal system, fees are automatically recovered by the prevailing party. Professor Ehrenzweig at the University of California at Berkeley, has published a number of studies on comparative aspects of this rule.²

I should point out that I am not necessarily urging a rule such as prevails in most other western nations; I am not suggesting that the Congress ought to consider by legislation implementing a rule that would provide that the prevailing plaintiff or prevailing defendant should automatically recover his fees. I am suggesting only that in a limited number of public interest cases which conform to the various criteria that I have referred to both in my written and oral testimony, should a prevailing plaintiff be awarded fees. I don't think that a prevailing defendant in a public interest case ought to get fees unless the suit brought was frivolous or solely to harass; and in that situation I would think a prevailing defendant ought to get fees.

Senator TUNNEY. The focus of this Subcommittee is on the ability of the average citizen to find redress for his grievances. Had some private foundation not seen fit to fund your organization, where would the Mexican-American residents of the Bay Area have turned in order to get representation in the highway cases that you mentioned in your statement?

¹ Set forth in full at page 1305.

² Set forth at page 1388.

Mr. KLINE. The people who live in the path of that highway did not originally turn to us, they turned to the OEO Legal Services program that was operating in that part of the county. The problem with that was that the OEO Legal Services program was inundated with service cases and had no expertise in the relevant areas of the law. My firm was asked to take the case because we had quite a bit of expertise. The people in the community asked us to take the case because we were the only lawyers they could find who both knew something about the area and did not require prepayment of fees.

Senator TUNNEY. Well, can you tell me whether or not it would have been possible to have had a judicial declaration of the rights of these residents if it had not been for the foundation funding?

Mr. KLINE. I don't think it would have. I think that this is also true of 50 or 60 public interest cases that our firm currently is actively litigating.

I don't think that is true of all of them. There are other resources in the State of California, as the Senator is well aware; but because of what I regard as very unrealistic income guidelines for OEO Legal Services lawyers, and because of the dearth of public interest lawyers, it is very difficult to find counsel willing to take a public interest case without payment of a retainer. In this connection, you may be interested to know that there are only 22 public interest lawyers in the State of California who are directly or indirectly supported by foundations. Some people are under the impression that there exists in this Nation a vast army of public interest lawyers hiding under every bed. That is hardly the case.

Senator TUNNEY. How many members are there of the bar in California?

Mr. KLINE. There are approximately 37,000 members of the bar in California.

Senator TUNNEY. Twenty-two out of 37,000. In other words, this highway project which was held to violate three recently enacted congressional statutes—the National Environmental Policy Act, the Uniform Relocation Act, and the Department of Transportation Act of 1966—would have gone right ahead and ripped up the parks and the communities if it had not been for the fortuitous event of a foundation to making funding available for your organization.

Mr. KLINE. Yes. And I might add this case is probably not the most dramatic example of that situation. In Los Angeles, as you may be aware, the Federal Government and the State of California proposed to build the so-called Century Freeway that would have paralleled the Santa Monica Freeway from El Segundo to Downey. This highway project is one of the most expensive in the United States; being estimated to cost half a billion dollars. This freeway was enjoined for precisely the same reasons as the freeway in Alameda County. It would have displaced 20,000 people, the majority being black residents of Watts, in a city in which the vacancy rate is less than 1 percent, not to speak of the environmental damage to the Los Angeles Basin; assuming it is still possible to further damage the environment in Los Angeles.

Senator TUNNEY. It sounds like you are from Northern California.

On page 24 of your testimony you suggested that it might be useful for Congress to provide guidelines for the courts, including a direc-

tion that a plaintiff who prevails in certain public interest litigation ought to recover a reasonable attorneys' fees award. Is this already the law according to the Supreme Court decision in the *Northcross* case¹ and the fifth circuit decision in *Cooper v. Allen*?²

Mr. KLINE. No, I don't really believe that it is. I think that the situation that prevails in school desegregation cases, (and *Northcross* was a school desegregation case), is a bit different than it is in most other areas. I think that the reason that fees are now awarded so readily in school desegregation cases is the experience in the latter part of the 1950's and early 1960's after *Brown v. Board of Education* when school districts throughout the South were intransigently refusing to implement the Supreme Court decision in *Brown* and were forcing the NAACP to litigation knowing they would lose. In those cases fees were really in the nature of punitive damage, and so a slightly different rule seems to have developed in these school cases, although I would concede it has never been fully articulated. The problem that I see is that in most other areas the courts have not found any consistent standard.

Judge Johnson in the Middle District of Alabama and Judge Spears in the Western District of Texas³ have apparently seized on the attorney fee standards set forth in the Criminal Justice Act for no reason other than it seems to be the closest parallel. But the standards of this Criminal Justice Act, which provide for \$20 an hour for noncourt time and \$30 an hour for court time, are exceedingly low. To most able litigators, particularly those who litigate in Federal courts in major cities in this country, \$20-\$30 an hour really involves a substantial financial sacrifice. I believe that, if it is going to act in this field, Congress ought to provide guidelines for fees that make it unnecessary to rely on the noblesse oblige, of private attorneys willing to make the severe economic sacrifice now necessary to take on a complex public interest case. I don't think that the vindication of important rights in this Nation ought to depend upon the concept of noblesse oblige. I think counsel for plaintiffs in successful public interest cases ought to be awarded fees that are commensurate with the fees obtained by private lawyers in the vicinity in comparable litigation.

I am not suggesting, by the way, that the Congress ought to specify a dollar figure. In fact, one professor traces the reason for general rule in this country that fees are not recoverable, to the fact that in the code in the 19th century in New York there was a provision that the legislature inserted in the act prescribing the dollar amount of fees. What happened was that with inflation in this Nation in the middle and latter part of the 19th century that dollar figure became totally unrealistic and lawyers and judges eventually militated for the now prevailing rule. I think that there ought to be guidelines but I think the courts ought to have discretion in this area. What constitutes a reasonable fee will undoubtedly vary from case to case and may vary from area to area.

¹ Set forth at page 1302.

² Set forth at page 1321.

³ See page 1363.

Senator TUNNEY. Do you think that there is a danger of an attorney selling out his client in order to get a fee, settling the case when he should not?

Mr. KLINE. No; I don't. I don't think that your democratic colleague in California, Mr. Alioto, was ever accused of selling out his client's legal interests to their adversaries. He has been accused of a lot of things, but never that. But he was getting fees, in part, under a provision of the Clayton Act; and that has been true in the private antitrust field for years, as it has in other commercial areas. With respect to these commercial areas of the law in which fees are recoverable it has never been suggested that plaintiffs' counsel were selling out their clients. Nor have I ever heard it claimed that in suits under title II or title VII of the Civil Rights Act, plaintiffs' counsel were selling out their clients. I have never heard it suggested that as a general proposition personal injury lawyers sell out their clients, and they are working on a contingent fee arrangement. I think it is wholly unjustified to assume without any evidence to support it that public interest lawyers are different than any other kind of lawyers with respect to their ethical responsibilities to their clients.

Senator TUNNEY. Do cases like *La Raza* differ from any other contingent fee litigation in this regard.

Mr. KLINE. Yes; they do. The area of the law in which the contingent fee is the most relied upon is personal injury work, and in that situation a lawyer is at least assured that if he wins he is going to get a fee. But that is not the case in the area of the law in which I work. I cannot be assured that simply because I win I am going to get any fees; I have to rely upon the equitable discretion of the judge. Whereas, if I represent the plaintiff in a personal injury suit and recover \$100,000 in San Francisco I will probably receive a fee of \$33,000 and I can be assured of that, but a public interest lawyer has no such assurance even if he won; that is, I think, an important difference.

Senator TUNNEY. What kind of reception has Judge Peckham's rule met with in other Federal courts?

Mr. KLINE. Well, that decision has been relied upon by other courts in the Ninth Circuit. Judge Pregerson in Los Angeles has just relied upon Judge Peckham's ruling in awarding fees to plaintiffs in the *Century Freeway* case. Judge King in Hawaii has relied upon Judge Peckham in a suit involving political campaign practices. Judge Gerhard Gesell relied in part on *La Raza* in awarding attorney's fees in the *Pyramid Lake* case.¹ Judge Spears in the Western District of Texas has relied upon it in awarding fees to the Sierra Club in an environmental case in San Antonio.² There have been at least three law review articles published in the last 2 or 3 months that have focused on Judge Peckham's opinion and have commented approvingly on it. The case is before the Court of Appeals for the Ninth Circuit, it has not even been argued on the merits yet, although that will occur next week, and the attorney fee appeal should be argued before the court in about 4 or 5 months.

¹ Set forth at page 814.

² Set forth at page 1363.

Senator TUNNEY. To your knowledge have any of the State courts followed this rule?

Mr. KLINE. Yes; they have. We were awarded fees in California by the then presiding judge of the Superior Court in Sacramento County in a suit in which it was found that the Department of Corrections in California had failed to comply with the State Administrative Procedure Act in issuing rules and regulations respecting prisoners. Judge Bostick in Alameda County has done the same thing in a first amendment case. It is beginning to happen. Though I would have to say that the State courts have not been as aggressive in this area as the Federal courts, certainly not in California.

Senator TUNNEY. On page 7 of your prepared statement you state that you feel that until such time as the private bar becomes more substantially involved in important social litigation, the effect of this litigation will remain essentially the same and insignificant.

Can you tell us in your opinion how you feel the private bar can become more involved, recognizing as we all do, the economic fact of life that many lawyers have overheads which they have to maintain. Unless they have what they consider to be an adequate cashflow they are not going to be able to maintain their offices. I am curious if you had an opportunity to work out in your own mind any particular mechanisms that could be used to involve the private bar?

Mr. KLINE. Well, I hope that this is the central problem. This is the problem that I think that the Congress has got to address.

Let me preface my response to the question by noting that I don't believe that the purpose of court awarded fees in public interest cases, ought to be seen as only facilitating the very, very few foundation supported public interest law firms that exist in this Nation. I think that sometimes people get a false perspective in Washington, D.C. It happens that at least 50 percent of the public interest law firms in the whole country are in this city. The fact is there are very few public interest law firms in this country. It is my basic thesis that the practice of law in the public interest, however that is reasonably defined, will become important in this country only when the private bar becomes substantially involved.

The private bar in this Nation has been concerned for some time with the problem of how best to discharge its public responsibilities. Equal justice under law is the guiding principle, but that principle is only meaningful if all citizens have equal access to lawyers. The private bar's solution to this problem has never changed. The solution was to create within the profession a so-called public section. This originally took the form of legal aid societies which were first formed in the nineteenth century; then, with the expansion of 6th amendment rights, the public defender's office became a serious factor in the country. Later, to help fight the war on poverty, government developed the OEO legal services program. Now we have foundation supported public interest law firms. They are really all the same thing: discharge the public responsibilities of the legal profession. However, this so-called public sector at most represents maybe 2 or 3 percent of the entire legal profession in this country. My point is that unless we can find a way to engage the other 97 percent of the legal profession, citizens in this country are not going to adequately

represented with regard to matters of broad public interest. I believe that the main reason that the private bar is not substantially involved in representation of the public interest is not because private lawyers are ideologically or otherwise unsympathetic to plaintiffs. The reason is rather simple economics. A private lawyer cannot afford to take out the time, the enormous amount of time required to litigate many if not most public interest cases. For example, my law firm has been actively litigating *Serrano v. Priest*, the well-known California school tax case, for over 3 years. One case has cost our firm over \$35,000 in expenses. To ask a private lawyer who does not have a foundation behind him, who is not seeking damages, who has no assurances he will be awarded fees if he wins, much less if he loses, to take that kind of case is asking a lot.

Senator TUNNEY. I have had discussions with the top officials of the American Bar Association and they are deeply concerned about this problem and they are trying to study it, think it through and offer suggestions to State and local bar associations with the purpose of alleviating a serious problem.

What do you think that the bar association can do in order to facilitate a greater interest on the part of the private bar in these social interest cases?

Mr. KLINE. The problem is not that private lawyers are disinterested. I don't think that is the problem. I think they are interested. I think in fact this area of the law is widely regarded as one of the most interesting in which a lawyer can practice. I think the problem is simply to eliminate the economic obstacles to private involvement in public interest cases.

I think the legal profession, the institutionalized bar, may be ambiguous about this. Bar associations are naturally concerned about the profession's public image. If the institutionalized bar publicly endorses a fee mechanism, no matter how genuinely idealistic their reasons, they may be perceived as simply trying to line their own pockets. But I think there are some things the profession can do and is doing to remove the obstacles to securing legal assistance in public interest cases. The San Francisco Bar Association has acted as *amicus curial* in public interest cases where the fee question is presented, as has the National Legal Aid and Defender Association. There is a lot beginning to appear in the state bar journals on the subject and bar associations are beginning to talk about the subject at their meetings. But I don't know what more the institutionalized bar can do other than to support progressive legislation and to help advance progressive judicial decisions.

There is in my view not much else the bar itself can do to eliminate the economic factors that currently make it very difficult for citizens to find private attorneys willing to represent them in important public interest cases.

It may be worth noting that the only substantive area of the law where, in my opinion, the private bar already accommodates the interests of poor people is personal injury work. The majority of plaintiffs in personal injury cases are poor people, because the poor are more subject to personal injury than the rich. However, a personal injury lawyer does not care whether his client is rich or poor,

because he is not looking to the client for his fee. Thus, there is no problem finding lawyers to represent plaintiffs in personal injury cases. An analogous fee-shifting mechanism can, in my view, help remove the obstacles that now seriously restrict access to counsel in public interest cases.

Senator TUNNEY. I want to thank you very much for making your views known to us and having spent such a long period of time preparing your written statement. Thank you again.

Mr. KLINE. Thank you, I am grateful for the opportunity.

[The testimony resumes at page 806. Mr. Kline's prepared statement follows:]

STATEMENT OF J. ANTHONY KLINE, ATTORNEY AT LAW, PUBLIC ADVOCATES, INC.,
SAN FRANCISCO, CALIF.

Mr. Chairman and members of the committee, I very much appreciate this opportunity to present my views on the relationship between court-awarded attorneys' fees and the delivery of legal services. This is a subject that has more profound implications than may initially appear, as it touches directly upon the ability of our democratic institutions to serve all the People.

The democratic promise of "Equal Justice Under Law" necessarily requires equal access to legal institutions. In this Nation, perhaps more than in any other, access to legal institutions presupposes access to lawyers. Notwithstanding the fundamental aspect of this proposition, however, the uncomfortable, indeed unconscionable, fact remains that the legal profession is not nearly as accessible to the People as the minimum requirements of equal justice demand; and the fault is not entirely that of the Bar.

In these remarks I shall address myself to the difficulties encountered by individuals and groups in obtaining adequate legal representation in those civil matters that are in the public interest. As I shall be using the term extensively, I must here at the outset define what I mean by "public interest litigation." I recognize, of course, that all non-frivolous litigation is in the public interest, since society always benefits when the rule of law is invoked for the resolution of disputes. Nevertheless, by "public interest litigation" I have in mind only a small fraction of the civil controversies submitted to the courts. As has been noted,¹ three characteristics are normally common to lawsuits which most would classify in the public interest:

"The first of these characteristics is that the issues involved are currently regarded as being of extreme importance. Their significance may be inferred from the fact that the issues, such as environmental or consumer protection, have been the recent subject of considerable legislative and public concern. In other cases, the issues, such as the right to welfare benefits or to have an abortion performed, may go to the very essence of life itself. Finally the issue may involve a right specifically protected by the Constitution, such as the right to vote, or the freedom of speech or religion.

"The second characteristic of public interest litigation is that the final judgment will affect not only the plaintiffs who initiated the action, but a substantial number of other individuals as well. For example, in an environmental suit to enjoin the polluting of a river, the outcome will determine whether all persons who presently live near or use the river, and future generations of such persons, will have an unspoiled body of water to utilize and enjoy * * *.

"The final characteristics of public interest litigation is that it is brought by a private plaintiff rather than by a government agency. It does not matter whether the plaintiff is an individual, a group of persons or an organization; the crucial element is that the plaintiff does not have an obligation under the law to initiate the type of lawsuit that has been brought."

In short, unlike the vast majority of lawsuits, public interest litigation is not concerned with a private controversy between plaintiff and defendant, but rather involves disputes of extreme social importance which when resolved will affect substantial numbers of people.

¹ Nussbaum, *Attorney's Fees in Public Interest Litigation*, 48 N.Y.U.L. REV. 301, 304-305 (1973).

A number of federal courts, including the Supreme Court, have recently expressed the belief that public interest litigation must be affirmatively encouraged. This is so, the courts have noted, because only in this manner can many important public policies be effectively enforced. What the courts have come to realize is that a vast array of important legislative policies are embodied in federal and state statutes that are not and can not be enforced by the Justice Department or by State Attorneys General; these statutes can only be enforced by affected citizens in private litigation; or, in more accurately, in litigation that is "private" in form only. Consider, for example, the National Environmental Policy Act of 1969, generally regarded as the most important environmental law ever enacted by the Congress. The requirements of this new law are imposed upon federal administrative agencies. The Justice Department therefore defends rather than prosecutes alleged violators of the law. The same is true of a multitude of legislative enactments in other substantive areas of the law that create similarly broad public rights. These statutes will be enforced, if at all, through public interest litigation commenced by individual citizens or their associations.

Judicial statements of the need to facilitate public interest litigation have been prompted by a recognition of the built-in disincentives that effectively operate to prevent or at least discourage citizens from commencing such suits. The most important of these disincentives, in my view, is the enormous expense that is almost inevitably involved in maintaining a complex and time-consuming case against a governmental agency or large corporation that has a veritable army of lawyers and numerous other legal resources at its ready disposal. Since such litigation rarely seeks damages from which counsel can be recompensed, most lawyers are very reluctant to undertake these burdens.

Perhaps I can best illustrate the difficulties public interest lawyers confront by describing a more or less typical case my firm litigated successfully in California. The case, entitled *La Raza Unida v. Volpe*, 337 F. Supp. 221 (N.D. Cal. 1971), involved a \$100 million federally financed freeway proposed to be built in Southern Alameda County between the cities of Oakland and San Jose. The freeway would not only have destroyed the last three remaining municipal parks in the area, but would as well have destroyed desperately needed low-income housing inhabited by over 5,000 Mexican-American families and individuals. Due to the housing crisis in the San Francisco Bay Area, and because of racial discrimination in the private housing market there, these families and individuals could not have found adequate relocation housing within their financial means and would have been forced into already overcrowded ghetto areas of San Jose and East Oakland.

The Federal District Court ruled in favor of the plaintiffs and enjoined construction of the highway after finding, first, that highway officials had failed to comply with laws protecting public parks and the environment generally and, second, that such officials had failed as well to comply with the Uniform Relocation Assistance Act of 1970. That federal law provides that highway authorities may not displace residents and demolish their homes without first assuring that decent, safe and sanitary relocation housing exists at rents or prices within the financial means of displacees.

This lawsuit, which required enormous preparation, was litigated in the district court for a period of nearly six months. The defendants were represented by a dozen lawyers in the employ of the Justice Department in Washington, the Office of the United States Attorney in Northern California, the Office of Legal Counsel to the California Department of Public Works, and various city attorneys in Alameda County; not to speak of the many private lawyers engaged by land developers who intervened in the case. These lawyers had the help of scores of experts in the full-time employ of the Federal Highway Administration and the California Division of Highways.

Plaintiffs, on the other hand, had to spend weeks finding expert witnesses willing to prepare documentary evidence and to testify without fee. A majority of the experts contacted by plaintiffs were unwilling to assist for the sole reason that it might jeopardize their future ability to receive consulting contracts from the defendant federal and state agencies.

After ruling in favor of the plaintiffs, the court in a separate opinion (reported at 57 F.R.D. 94 (N.D. Cal. 1972)) awarded attorneys' fees to plaintiffs for the following reasons, among others:

* * * [E]xhortations towards citizen participation can sound somewhat hollow against the background of the economic realities of vigorous litigation. In

many "public interest" cases only injunctive relief is sought, and the average attorney or litigant must hesitate, if not shudder at the thought of "taking on" an entity such as the California Department of Highways, with no prospect of financial compensation for the efforts and expenses rendered. The expense of litigation in such a case poses a formidable, if not insurmountable, obstacle.

"The only public entities that might have brought suit in this case were named as defendants in this action and vigorously opposed plaintiffs' contentions. Only a private party could have been expected to bring this litigation, and yet a private party is least able to bear the tremendous economic burdens. To force the private litigants to bear their own costs here would be tantamount to a penalty, and it seems somewhat inequitable to punish litigants who have policed those charged with implementing and following Congressional mandates. Hence, the fact that only a private party could be reasonably expected to bring this action is one additional factor supporting the awarding of attorneys' fees in this case [57 F.R.D. at 101].

As I will explain in a moment, judicial decisions awarding fees to successful plaintiffs in public interest cases are still the exception rather than the rule; though in recent years there has been a discernable and salutary trend toward such awards. Before I describe this recent judicial trend, I think it important to explain why in my opinion the vast majority of private attorneys have been unable or unwilling to engage in public interest litigation; since it is my thesis that such litigation will remain relatively insignificant in this country until and unless the private bar becomes more substantially involved.

The reason for the relative inaccessibility of private legal assistance in these cases can not be ascribed to distaste for controversy on the part of the Bar (more than almost any group, the Bar thrives on controversy); nor is it true that most lawyers are ideologically or otherwise unsympathetic to the public causes they are asked to represent. The central reason has rather to do with simple economics.

As I have mentioned and as others will describe at greater length, public interest litigation is likely to involve matters that are legally or factually complex and, to many lawyers, even esoteric. Normally, neither private attorneys nor the vast majority of clients can afford the investment of money and time that such representation requires. For reasons that may be obvious, neither government nor private philanthropy alone can or should finance such legal representation. Experience has shown that government funds are either explicitly or implicitly conditioned in ways that limit effective advocacy.² Foundations or other philanthropic sources of support, on the other hand, do not individually or even collectively possess the means to adequately finance the work that is necessary, even indulging the unwarranted assumption that most are inclined to do so. Moreover, and perhaps most important, the vindication of important legal rights should not depend upon the beneficence of private philanthropy or be subject to the whim of government. Nor should it be made to depend upon the noblesse oblige of the occasional attorney who may be willing to provide representation without fee.

The reasons that citizens can not or will not themselves pay attorneys for representation in public interest cases are not always apparent. A vast number of public interest cases seek to vindicate the rights of low-income groups who, of course, can not afford fees. It has been suggested that these citizens can obtain free legal assistance through the federally financed Legal Services Program. This view is wholly unrealistic. First of all, of the approximately 355,000 attorneys licensed to practice in the United States, only 2,500 work for the Legal Services Program. Moreover, OEO regulations prohibit Legal Services attorneys from representing an individual with an annual income exceeding \$1,800 and a family of four having an annual income over \$4,000.³ The regulations thus preclude representation of millions who, as a practical matter, can not afford private counsel in even the simplest cases, and prevent Legal Services lawyers from litigating important issues that affect wage-earners and the middle class. In any case, the Legal Services Program is under such duress and is so understaffed that it can barely deal adequately with its lim-

² See, Note, *Federal Funds for Public Interest Laws: Plausibility, Politics and Past History*, 13 ARIZ. L. REV. 932 (1971).

³ See, *Guidelines for Legal Services Programs*, CCH Pov. L. Rptr., ¶ 10,770, at p. 11,612.

ited constituency.⁴ One prominent authority has shown statistically that "it is physically impossible for Legal Services, Legal Aid and other programs established to give civil legal assistance to the poor to serve all, or even a majority, of those unable otherwise to afford legal representation."⁵

But it is not simply the poor who are without legal assistance in public interest cases, and this is a fact not widely recognized. As pointed out at the commencement of my testimony, one of the central features that distinguishes public interest litigation from other suits is that the final judgment will affect not only the parties, but a broad segment of the public at large. Furthermore, such litigation normally seeks only injunctive and declaratory relief, not damages. Therefore, rarely will an individual—even a wealthy individual—be likely to seek out and pay counsel to commence costly litigation to vindicate, not his own private rights, but widely shared public rights. In other words, any single individual's interest in the enforcement of broad public rights is normally diffused in the public interest. In these circumstances it is not rational for any person to attempt to capture his or her minute portion of the aggregate good by using personal funds to pay the full cost of enforcing the mutual right.⁶

The courts and, to a lesser extent, the Congress, have both acted to mitigate the effect of these inherent disincentives to public interest litigation. The Congress has included provisions in a number of statutes that specifically authorize awards of fees to successful plaintiffs.⁷ However, with a few notable exceptions (such as the Truth-in-Lending Law, the Clean Air Act and Titles II and VII of the Civil Rights Act of 1964), these statutes pertain to commercial matters not likely to be the subject of any considerable amount of public interest litigation.

Further, until the 1968 *per curiam* decision of the Supreme Court in *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968), the courts did not always award fees even though Congress authorized them to do so. *Piggie Park* arose under Title II of the Civil Rights Act of 1964 (prohibiting discrimination in public accommodations), in which Congress provided that "the court, in its discretion, may allow the prevailing party * * * a reasonable attorney's fee * * *".⁸ The U.S. Court of Appeals for the Fourth Circuit had interpreted that provision as allowing attorneys' fees only to the extent that defenses had been advanced "for purposes of delay and not in good faith." 377 F. 2d 433 at 437 (4th Cir. 1967). The Supreme Court rejected this narrow view, however, and stated as follows:

"When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with law. A Title II suit is thus private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. * * * [O]ne who succeeds in obtaining an injunction under that Title should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." 390 U.S. at 401-02.

⁴ A former Director of the Office of Economic Opportunity estimated that the Legal Services Program meets only about 28% of poor people's legal needs. Testimony of Frank Carlucci, hearing on H.R. 40, H.R. 185, H.R. 357, etc., before the House Committee on Education and Labor, 92nd Cong., 1st Sess., Pt. e at 1566-67 (1971). See also, Clark, *Legal Services Programs—The Caseload Problem or How to Avoid Becoming the New Welfare Department*, 47 Urban L. 797, 798 (1970).

⁵ Silver, *The Imminent Failure of Legal Services for the Poor*, 46 J. URBAN L. 27 (1969).

⁶ In this connection, see M. Olson, Jr., *The Logic of Collective Action, Public Goods and the Theory of Groups* (Harv. Econ. Series No. 124, 1965), relied upon by the court in *La Raza Unida v. Volpe*, *supra*, 57 F.R.D. at 101.

⁷ See, e.g., Clayton Act, 15 U.S.C. § 15; Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-3(b), 2000c-5(k); Civil Rights Act of 1968, 42 U.S.C. § 3612(c); Communications Act of 1934, 47 U.S.C. § 206; Copyright Act, 17 U.S.C. § 116; Fair Labor Standards Act, 29 U.S.C. § 216(b); Interstate Commerce Act, 49 U.S.C. §§ 8, 16(2), 908(b); Merchant Marine Act, 46 U.S.C. § 1227; Packers and Stockyards Act, 7 U.S.C. § 210(f); Patent Act, 35 U.S.C. 285; Perishable Agricultural Commodities Act, 7 U.S.C. § 499g(b); Railway Labor Act, 45 U.S.C. § 153(p); Securities Act of 1933, 15 U.S.C. § 77k(e); Securities Exchange Act of 1934, 15 U.S.C. §§ 78i(e), 78r(a); Serviceman's Readjustment Act, 38 U.S.C. § 1822(b); and Trust Indenture Act, 15 U.S.C. 77www(a).

⁸ 42 U.S.C. § 2000a-3(b).

Piggie Park was the first Supreme Court decision to justify fee awards to "private attorneys general" as an effective way of facilitating public interest litigation based upon statutes that rely for their enforcement on "private" litigation.

Most of the progress in easing the burdens to public interest litigation has been made by the lower federal courts in cases in which the statute involved was silent on whether fees are allowable. Basically, what the courts have done over the years is to create certain exceptions to the general American rule that attorneys' fees are not recoverable as costs. As the Supreme Court pointed out earlier this year, this rule "is more restrictive than the general rule that prevails in most other nations." *Hall v. Cole*, 93 S.Ct. 1943, 1945 n.4 (1973). The court further noted, however, that "* * * [even] in the absence of statutory or contractual authorization, federal courts, in the exercise of their equitable powers, may award attorneys' fees when the interests of justice so require." *Id.*, at 1946. In the exercise of this equitable power, federal courts have carved out three exceptions to the general rule against awarding fees. The first exception permits a party to recover attorneys' fees when his adversary has engaged in vexatious conduct, such as instituting a frivolous or groundless lawsuit.⁹ The second exception pertains to cases in which a party produces, protects or increases a "common fund" in which others will share. This exception has normally been applied in stockholder derivative suits¹⁰ against a corporation or in suits by a beneficiary seeking to protect trust assets in which others will share.¹¹ Neither the "vexatious conduct" nor the "common fund" exceptions will normally apply in public interest litigation. Though a third and much more recently developed exception to the general rule against fee—the so-called "private attorney general" rule—potentially has broad application in public interest litigation; and this new exception is now receiving a great deal of attention by the Bar generally and public interest lawyers in particular.¹²

The "private attorney general" rule developed out of the common fund doctrine. Courts award fees under the common fund rule essentially on the ground that it would be unfair to force a litigant to bear the entire expense of litigation that has vindicated, not simply his own pecuniary interest, but the concomitant interests of numerous other similarly situated persons. The particular common fund case that, perhaps more than any other, led to development of the "private attorney general" exception is *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970). *Mills* was a suit by minority shareholders charging that a proxy statement sent out by management was materially misleading and therefore violated section 14(a) of the Securities Act of 1934. That section of the Act, unlike other provisions of the same statute, is silent on the question of fees. The lower courts had denied fees to the successful plaintiffs, first, because the suit did not result in an actual fund of money and, second, because of the view that if Congress had intended successful plaintiffs to be awarded fees it would have said so, as it did elsewhere in the Act. The Supreme Court reversed and held that fees should be awarded, stating as follows:

"Private stockholders' actions of this sort 'involve corporate therapeutics,' and furnish a benefit to all shareholders of the proxy statement. To ward attorneys' fees in such a suit to a plaintiff who has succeeded in establishing a cause of action is not to saddle the unsuccessful party with the expenses but to impose them on the class that has benefited from them and that would have had to pay them had it brought the suit." 396 U.S. at 396-397.

The Court also held in *Mills* that so long as the litigation conferred "substantial benefits" on the other affected stockholders, it was immaterial that such benefits were not pecuniary.

The reasoning of the decision in *Mills* led directly to development of the private attorney general" rule and broad application of this new rule in a fairly large number of recent public interest cases in diverse substantive areas of the law. In these cases, the courts have expressed the view that the same policies

⁹ See, e.g., *Hill v. Franklin County Bd. of Educ.*, 390 F. 2d 583, 585 (6th Cir. 1968).

¹⁰ See, e.g., *Hutchinson Box Board & Paper Co. v. Van Horn*, 299 F. 2d 424 (8th Cir. 1924).

¹¹ See, e.g., *Trustees of Int'l Improvement Fund v. Greenough*, 105 U.S. 527 (1881); and *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939).

¹² See, e.g., Nussbaum, *Attorney's Fee in Public Interest Litigation*, 48 N.Y.U.L. REV. 301 (1973); Note, *Awarding Attorneys' Fees to the 'Private Attorney General': Judicial Green Light to Private Litigation in the Public Interest*, 24 HAST L.J. 733 (1973); and Note, *Awarding Attorney and Expert Witness Fees in Environmental Litigation*, 58 CORNELL L. REV. 1222 (1973).

that justify an award of counsel fees to a plaintiff stockholder who protects the rights of other stockholders also justifies an award to a citizen plaintiff in a public interest case whose success in court confers substantial common benefits on other citizens. One federal court has briefly stated the "private attorney general" rule as follows:

"* * * [W]henver there is nothing in a statutory scheme which might be interpreted as precluding it, a "private attorney general" should be awarded attorneys' fees when he has effectuated a strong congressional policy which has benefited a large class of people, and where further the necessity and financial burden of private enforcement are such as to make the award essential." *La Raza Unida*, supra, 57 F.R.D. at 98.

Rather than attempt to discuss all of the pertinent cases that have applied this rule, let me focus on one case, *Sims v. Amos*, 340 F. Supp. 691 (M.D. Ala. 1972), aff'd, 409 U.S. 942 (1973), that provides a typical example of the situations in which the rule is employed. In its per curiam opinion in that case the three-judge panel set forth one of the best judicial expositions of the "private attorney general" rule. After finding the State Legislature of Alabama malapportioned and ordering into effect the single-member-district plan proposed by the plaintiffs (336 F. Supp. 924), the court granted plaintiffs' motion for attorneys' fees for the following reasons:

"In instituting the case *sub judice*, plaintiffs have served in the capacity of 'private attorneys general' seeking to enforce the rights of the class they represent. If, pursuant to this action, plaintiffs have benefited their class and have effectuated a strong congressional policy, they are entitled to attorneys' fees regardless of defendants' good or bad faith. Indeed, under such circumstances, the award loses much of its discretionary character and becomes a part of the effective remedy a court should fashion to encourage public-minded suits, and to carry out congressional policy.

"The present case clearly falls among those meant to be encouraged under the principles articulated in *Piggie Park Enterprises, Inc.* and *Mills*, and expanded upon in *Southern Home Sites* and *Bradley*. The benefit accruing to plaintiffs' class from the prosecution of this suit cannot be over-emphasized. No other right is more basic to the integrity of our democratic society than is the right plaintiffs assert here to free and equal suffrage. In addition, congressional policy strongly favors the vindication of federal rights violated under color of state law, 42 U.S.C. § 1983, and, more specifically, the protection of the right to a nondiscriminatory franchise.

"Despite the benefit to plaintiffs' class, however, and despite this suit's effectuating the purpose of congressional legislation, the case *sub judice* is one most private individuals would hesitate to initiate and litigate * * *.

"Consequently, in order to attempt to eliminate these impediments to pro bono publico litigation, such as is here involved, and to carry out congressional policy, an award of attorneys' fees is essential." (340 F. Supp. at 694-695)

The rule articulated in *Sims v. Amos* and the *La Raza Unida* case has been employed to award fees to successful plaintiffs in public interest cases concerning inadequate medical treatment of prisoners,¹³ improper treatment of mentally ill patients,¹⁴ the breach by a union of the duty of fair representation,¹⁵ racial discrimination in the sale of housing,¹⁶ violations of the Labor-Management Reporting and Disclosure Act,¹⁷ discrimination against welfare recipients,¹⁸ unconstitutional laws prohibiting political campaign signs,¹⁹ and violations of the National Environmental Policy Act of 1969,²⁰ among many other public interest issues.²¹

¹³ *Newman v. Alabama*, 349 F. Supp. 278 (M.D. Ala. 1972).

¹⁴ *Wyatt v. Stickney*, 344 F. Supp. 387 (M.D. Ala. 1972).

¹⁵ *Local 4076, United Steelworkers v. United Steelworkers*, 383 F. Supp. 1154 (W.D. Pa. 1972).

¹⁶ *Lee v. Southern Home Sites, Corp.*, 444 F. 2d 143 (5th Cir. 1971).

¹⁷ *Cole v. Hall*, 462 F. 2d 777 (2d Cir. 1972), aff'd sub nom, *Hall v. Cole*, 93 S.Ct. 1943 (1973).

¹⁸ *Ojeda v. Hackney*, 452 F. 2d 947 (5th Cir. 1972); *Hammond v. Housing Authority*, 328 F. Supp. 586 (D. Ore. 1971).

¹⁹ *Ross v. Goshi*, 351 F. Supp. 949 (D. Haw. 1972).

²⁰ *Sierra Club v. Lynn*, — F. Supp. —, Civ. Action No. SA-72-CA-77 (W.D. Tex., June 29, 1973).

²¹ For a compilation of reported and unreported public interest cases in federal courts where attorneys' fees have been awarded, see, Derfner, *Attorney's Fees in Pro Bono Publico Cases* (1972) (published by the Lawyers' Committee for Civil Rights, 733 15th St., N.W., Washington, D.C.)

In these cases the courts have made it clear that fees were justified even though the statutes involved were silent on the availability of a fee award,²² and even though the defendants had not acted in bad faith. The courts rather have emphasized that in granting fees, "the purpose is not to saddle the losing party with the financial burden in order to punish him, rather we shift the financial burden in order to effectuate a strong Congressional policy."²³

The positive attitude of the federal courts concerning the "private attorney general" exception to the general rule against fees is dramatized by the fact that since the decisions of the Supreme Court in *Piggie Park* and *Mills*, only six federal appellate decisions have reversed lower court rulings in this area, and five of those decisions reversed the denial of fees by the lower court.²⁴ And earlier this year the Supreme Court agreed to take an appeal from the only modern decision reversing a lower court award of fees.²⁵ The Supreme Court's recent decision in *Hall v. Cole*, 93 S.Ct. 1943 (1973), affirming an award of fees in a successful suit to enforce the Labor-Management Reporting and Disclosure Act has given further to the lower federal courts in this area.

It has been suggested by a few that the tendency of the courts to award fees in public interest cases is subject to abuse and may result in inundating the courts with frivolous litigation. I believe this view is wholly without merit. First, plaintiffs can only be awarded fees under the private attorney general rule if their efforts affirmatively result in the conferral of substantial benefits on the public; and even then the court has very broad discretion whether to make a fee award. Thus plaintiffs and their lawyers are acutely aware that they will themselves bear the heavy expense of an unsuccessful action; and they will therefore be unlikely to commence burdensome litigation without a strong good faith belief in the legal merit of their cause. Second, the courts can easily prevent or discourage frivolous suits by assessing fees against unsuccessful plaintiffs who have vexatiously commenced legal action imply in order to harass.

I would like to conclude my statement with two specific suggestions for affirmative legislative action in this developing legal area. The first pertains to the liability for attorney fees of the federal government; the second concerns the establishment of criteria to guide the courts in the exercise of their discretionary equitable power to award fees and in setting the amount of such fees.

1. Section 2412 of Title 28 of the United States Code provides that:

"Exception as otherwise specifically provided for by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action * * *." (Emphasis added.)

This provision, which was enacted in 1966, was intended to have a liberalizing effect, since the predecessor statute allowed fees and costs against federal defendants "only when such liability is expressly provided for by Congress." 62 Stat. 973. However, in practice, the 1966 enactment has had an unduly constrictive effect that is entirely inconsistent with the strong policies that support fee awards to successful plaintiffs in public interest cases.

Federal agencies are named as defendants in a surprisingly large number of cases that meet the three criteria defining public interest litigation. This is particularly true in environmental cases and in suits by low-income persons challenging the denial of rights conferred by statute, such as the rights to welfare benefits, relocation housing, etc. In these cases the difficulties normally present in public interest cases are exacerbated by the enormous legal resources of a defendant federal agency. Where such a federal agency has been found by the courts have violated important legislative policies or constitutional mandates, no reason appears why it should not be liable for the fees incurred by the plaintiffs who bore the burden of vindicating the rights of the affected public. On the contrary, successful public interest cases involving a defendant

²² See, e.g., *Sims v. Amos*, *supra*, 340 F. Supp. at 695; and *NAACP v. Allen*, *supra*, 340 F. Supp. at 709-710.

²³ *La Raza Unida v. Volpe*, *supra*, 57 F.R.D. at 102.

²⁴ *Lee v. Southern Home Sites, Corp.*, 444 F. 2d 836 (5th Cir. 1972); *Ojeda v. Hackney*, 452 F. 2d 947 (5th Cir. 1972); *Jinks v. Mays*, 464 F. 2d 1223 (5th Cir. 1972); and *McEnteggart v. Cataldo*, 451 F. 2d 1109 (1st Cir. 1971).

²⁵ *Bradley v. School Bd. of City of Richmond*, 472 F. 2d 318 (4th Cir. 1972), *cert. granted*, 41 U.S.L.W. 3644 (June 23, 1973).

public agency present strong policy reasons for the assessment of fees. First of all, such suits can only be commenced by private citizens who thereby perform an essential public service. Moreover, forcing the federal government to pay fees is the most practical and equitable method of spreading the burden of enforcement among all the taxpayers, who are the beneficiaries of that enforcement. Such a result falls easily within the intent of the Supreme Court, expressed in the *Mills* case, that a fee award is most desirable where it "will operate to spread the costs proportionately among [beneficiaries]."

The federal courts have on numerous occasions held that principles of sovereign immunity do not insulate state and local government agencies from liability for fees and that a state government "has no power to impart to its offices any immunity from * * * court costs."²⁶ And some federal courts have expressed frustration that 28 U.S.C. § 2412 arbitrarily prohibits them from holding federal defendants similarly liable for fees in appropriate cases. One very recent case provides a good example of this judicial attitude.

In *Sierra Club v. Lynn*, the plaintiffs successfully charged that, in violation of the National Environmental Policy Act, the U.S. Department of Housing and Urban Development had failed to prepare an adequate environmental impact statement in connection with a large federally financed redevelopment project near San Antonio that affected financed redevelopment project near San Antonio that affected a major underground reservoir. After the litigation was concluded, Federal District Judge Adrian A. Spears awarded attorneys' fees to plaintiffs against the non-federal co-defendants but not against HUD. As stated by Judge Spears: "Although this Court would like to spread the cost of the award equally between [the non-federal co-defendant] and HUD, it finds that, by Congressional mandate, it is prohibited from doing so. See 28 U.S.C.A. § 2412." *Sierra Club v. Lynn*,—F. Supp.—, Civ. No. SA-72-CA-77 (W.D. Tex., June 29, 1973) (Slip opinion, p 4). This unwarranted and unfair prohibition, which the Congress never intended to operate against the public interest, should be eliminated. In my view this would almost certainly diminish the number of public interest cases litigated against the federal government. At present federal agencies have no incentive to seriously reconsider the legality of challenged action since they do not suffer the expense of litigation in the same manner as private litigants. For this reason much needless litigation currently clogs the courts. If federal agencies had to account for the cost of successful legal action against them, they would more likely force litigation only where they and their counsel were strongly convinced of the legality of the policies and practices under challenge.

2. While I believe the courts should retain reasonable discretion whether to award fees to successful "private attorneys general" who, in effectuating legislative policies and constitutional rights, have conferred substantial benefits on the public, I also believe it appropriate for the Congress to provide guidelines for the exercise of such discretion. For example, I think it would be very useful for the Congress to direct that where the enforcement of public rights depends in large part upon "private" litigation, and where the vindication of such rights in a particular lawsuit confers benefits on a substantial number of persons other than the nominal plaintiffs, successful plaintiffs should ordinarily recover a reasonable attorneys' fee unless special circumstances would render such an award unjust.

I believe it would also be extremely useful for the Congress to provide at least general criteria to guide the courts in setting the amount of fees; as at present there is great disparity among the courts in this area. Since the clear purpose of fee awards in public interest cases is to mitigate the economic burdens of such litigation and thereby to facilitate and encourage employment of the judicial process a fee award that does not fully compensate plaintiffs is at odds with the underlying policy. It can be shown that the fee awards that have been granted to "private attorneys general" who have enforced exceedingly important legislative policies have, as a general rule, been far lower on an hourly basis than are awarded in commercial cases having much less public importance. At least part of the reason for this is the absence of standards to guide the court. Consider, for example, the following statement of the court in *Sierra Club v. Lynn*, *supra*:

"The award of attorneys' fees is not intended to make either the client or the attorney whole, nor in any means fully compensate counsel for the time

²⁶ *Sims v. Amos*, *supra*, 340 F. Supp. at 694; see also, *La Raza Unida v. Volpe*, *supra*, 57 F.R.D. at 101.

expended in this extended and complex litigation which has stretched out over a period of a year and a half. The Court does not feel that the minimum fee schedule of the State Bar of Texas may be used as a proper basis for measuring the rate of compensation to be awarded in a case such as this. Nor does the Court find that the fee a practicing attorney would charge a private client, willing and able to pay, to be appropriate in this case. Rather, considering the Criminal Justice Act, and the purpose of that Act, the Court finds that the statutorily enumerated rate of compensation set out in 18 U.S.C. § 3006A(d) (1972), is a reasonable guide for setting compensation in public interest civil litigation. That section provides for compensation at the rate of \$30 an hour for time spent in court, and \$20 an hour for out-of-court time. As noted by District Judge Frank Johnson: "It is the duty of members of the legal profession to represent clients who are unable to pay for counsel and also to bring suits in the public interest." *Wyatt v. Stickney*, 344 F. Supp. 387, 410 (M.D. Ala. 1972). The rates set out by the CJA provide neither unjust enrichment nor undue impoverishment of counsel who commendably bear a large share of the public responsibility of the legal profession." (*Sierra Club v. Lynn*,—F. Supp.—, Civ. No. SA-72-CA-77 (W.D. Tex., Aug. 25, 1973))

It is my view, and I believe the view is shared by most experienced attorneys, that \$20 to \$30 an hour in complex federal litigation is unreasonably low in the extreme. So low, in fact, that if it were ever accepted as the standard, very few competent counsel would allow it much weight in deciding whether to accept a public interest case. Most able litigators charge commercial clients at least \$50 to \$75 an hour, and in urban areas the hourly charge is usually higher. An attorney who, if he wins a time consuming case may be compensated at \$20 to \$30 an hour is really being asked to make a substantial sacrifice. To justify the imposition of such a sacrifice on the basis of the duty of the legal profession to represent those who can not pay may or may not be unrealistic, but it is certainly at odds with the principle of "equal justice under law," since it would make the vindication of important public rights depend upon the medieval and anti-democratic concept of noblesse oblige.

I do not believe that awards of attorneys' fees in public interest cases will implement the policies that are used by the courts and by Congress to justify such awards unless they are at least equivalent to the fees that would be received in comparable private cases. Indeed, if any difference is warranted, it should be to allow higher fees in public interest cases because of the well-established principle that a larger fee is justified where its payment depends upon the attorneys' success than were he remunerated regardless of whether his efforts are successful.²⁷

* * * * *

I hope that my views will provide helpful to the Subcommittee; and I wish again to thank you for this opportunity to express those views.

Senator TUNNEY. The next witness is Mr. L. Graeme Bell, III, Esq., attorney, Native American Rights Fund, Washington, D.C.

STATEMENT OF L. GRAEME BELL, III, ESQ., ATTORNEY, NATIVE AMERICAN RIGHTS FUND, WASHINGTON, D.C.

Mr. BELL. I thank you for the opportunity to present my views particularly on 28 U.S.C. 2412 as it restricts the award of attorney fees against the United States. Because of my position with Native American Rights Fund, my principal concern is the effect of this statute on Indian tribes throughout this country and my thesis is that the restriction in 2412 has a particularly inequitable effect vis-a-vis Indian tribes in this country.

As you know, the United States is charged with a trust obligation vis-a-vis the assets and resources of the American Indian Tribes in

²⁷ See, e.g., *Harris v. Chicago Great W. Ry.*, 197 F. 2d 829, 836 (7th Cir. 1952); *Silver v. Rosenberg*, 139 F. 2d 1020, 1021 (2d Cir. 1944); *Monaghan v. Hill*, 140 F. 2d 31 (9th Cir. 1944). See also, Hornstein, *Legal Therapeutics: The 'Salvage' Factor in Counsel Fee Awards*, 69 HARV. L. REV. 658 (1956).

the country. This trust obligation has been deemed by a number of courts to be that of any other legal trustee in the country. Consequently, the United States must manage these assets and resources with the highest degree of diligence.

As you well know, the United States also has the duty of managing the public interest which oftentimes comes into conflict with the trust responsibilities owing to the American Indian tribes, and oftentimes this conflict is resolved against the tribes in violation of the trust responsibility, consequently.

The paradigm of this conflict was the *Pyramid Lake* case where we have a reservation set up that is entirely dependent upon the waters from the Truckee River which flows through California and into Nevada and terminates in Pyramid Lake, which is the focal point of the Pyramid Lake Reservation. The lake and the tribe are totally dependent upon the waters of the Truckee River and sufficient flow in the Truckee River to keep the water level stabilized.

In 1902 Congress passed the Reclamation Act and in 1906 a diversion dam was set up along the Truckee River which diverted the waters from the Truckee River and dedicated them to the use of upstream landowners who were encompassed within what is now called the Newlands Reclamation project. As a result of these water diversions, since 1906 the lake has dropped in elevation more than 70 feet. The natural fishery in the lake, upon which the tribe was totally dependent, has completely died out because a delta has formed where the Truckee flows into the lake and fish cannot get up the river to spawn. The artificial fishery, which the tribe then instituted, was very much threatened by the rise in the salinity level of the lake as well as the erosion effect of having a decrease in the water level.

In 1970, the tribe was in desperate straits and came to Native American Rights Fund and asked if we could help them litigate this problem. They had seen very clearly that there had been a conflict of interest here and they were taking the brunt of it.

We instituted suit against Secretary Morton, the nucleus of our suit being that the United States has breached its trust responsibility to the tribe by diverting this large amount of water away from Pyramid Lake.

The suit ultimately was won in district court in Washington, D.C., and the problem of Pyramid Lake has been only temporarily solved. Judge Gesell found that the Secretary of Interior had breached or had caused a breach of the trust obligation of the United States to the Pyramid Lake Tribe.

After the litigation was concluded we made a motion for attorneys' fees knowing of course, that section 2412 restrict the award of attorneys' fees against the United States.

We made a number of arguments, the first of which was based on section 175 of title 25 of the U.S. Code, which requires in some situations that the United States institute suit on behalf of American Indian tribes. This has been deemed part of the trust responsibility and it is now codified in section 175. Of course the United States in the *Pyramid Lake* case could not institute suit on behalf of this Pyramid Lake Tribe because they in fact were the culprits.

So our argument was in essence that since they could not bring the suit and since they were causing the final ruin of the tribe, literally,

they should pay the attorney fees commensurate with what they would otherwise be doing in litigating in the interest of the tribe.

The second argument was essentially that the tribe was forced to pay for this litigation out of its own treasury. In essence, the litigation itself to bring the United States into compliance with its trust responsibilities caused this further depletion of the tribe's trust assets. Consequently, we determined that we had a second suit available to us against the United States for the depletion in the trust assets caused by having to litigate this case against the United States.

Judge Gesell, last November, I am sorry, last June, ruled that we could get attorney fees and awarded us over \$100,000.

The case is now on appeal. At this point, the government is taking the appeal just on the attorneys' fees issue.

My recommendation, the recommendation made by the Native American Rights Fund, on one level parallels that of Mr. Kline, saying that in suits against the United States where a private litigant is forcing the United States to comply with the law, it seems very inequitable for the private litigant to have to pick up the cost of the litigation and that the real beneficiaries of any litigation to force compliance with the law are the people of the United States. The best way of allocating that portion of the litigation is by the award of attorney fees against the Government. Certainly in the more narrow context of American Indian tribes, it is particularly important whenever the United States has been deemed in breach of its trust responsibility to the tribes, that they be made whole again for the fight they have incurred and for the costs they have incurred in regard to that fight. And we suggest that there be an amendment to section 2412 particularly with reference to litigations involving the trust responsibilities of the United States to the American Indian tribes.

That summarizes my testimony.

Senator TUNNEY. I have read your testimony and it is very interesting to me because I have been for quite sometime very deeply concerned about the failure of the Government of the United States to protect Indian rights, particularly Indian water rights in the Southwest. I have served in the past on the board of directors of the Indian Legal Services Corp. in California, and I have noted rather mournfully that the Federal Government has repeatedly failed to protect Indian rights that were obvious rights when it appeared that the majority of public opinion in the particular area where the rights were being contested favored the derogation of those Indian rights. A right is a right irrespective of whether the majority happens to agree that the right should exist. I am thinking particularly of taking Indian water and transporting it to some other area and building up cities, or using Indian water for irrigation. I am not saying that Indian water ought necessarily be sacrosanct if there is some great national interest that is going to be served, but the Indians ought to be paid for it; and they ought to have an opportunity to contest it; in other words, Indian rights ought to be considered as important as any other rights of either a private individual or of a governmental entity. In some of these cases the Indians have treaties with the

United States—their land holdings are not the typical land holdings of the private citizen. They deserve protection. I am very deeply concerned with the problems that you raise.

In your prepared statement, you say:

Approaching 28 U.S.C. Sec. 2412 from a broad perspective, Native American Rights Fund suggests that this statute be amended so that a private litigant may be awarded attorneys' fees and other litigation expenses arising from a successful lawsuit against the government, which suit is necessitated by and founded on the government's failure to comply with applicable law.

Now, we run into a problem here because when this statute was passed, the Congress was attempting to protect the Government against those actions of its servants, and public officials. If litigation against the Government is successful it is going to cost the taxpayers of the country money. I am wondering if you can distinguish Indian cases where there is a fiduciary relationship between the government and the Indians, from those cases not involving Indians, where there is no trust relationship. Is there a meaningful distinction?

Mr. BELL. Yes; I think the distinction is very real and the distinction is founded on the very nature of the trust responsibility.

I think that a very nice exception from section 2412 can be drawn in the context of the Indian trust responsibility, where there has been a determined failure of the United States to live up to that trust responsibility, that the particular tribe that has suffered should not have to further suffer the cost of the particular litigation which is also a drain of its trust assets.

I think there is a very significant distinction between the Indian tribes in this country and other private litigants against the Government, although I do think on a much broader perspective when the United States is forced to comply with the law, the United States should pay the cost of it. On the more narrow perspective I think, however, that a distinction can be drawn for Indian tribes.

Senator TUNNEY. The thing that I am concerned about, and I know that you have spent a lot of time thinking about it, is how do you protect the taxpayers from the malfeasance of public servants and yet at the same time protect the rights of individuals who have been subjected to the malfeasance of the public servants. In weighing the rights and the equities in 28 U.S.C. 2412, the Congress determined that they ought to give a priority consideration to the taxpayers and protect them against the malfeasance of public servants.

How in your mind can one protect the taxpayers and still achieve the results that you suggest—that there should be this shifting of burden of the cost of litigation?

Mr. BELL. Let me give you an example in the *Pyramid Lake* case of something that may strike a bell.

In that case, in November of 1972, the court ordered the Government to come in with new operating criteria that would comport with their trust responsibility, giving very specific directions to the Secretary of the Interior as to what should be contained therein. The Secretary of Interior in December of 1972 came in with something that to any layman, let alone a hydrologist or lawyer, was completely contrary to the trust responsibility as well as the judge's order.

When we went back in for hearings on this submission by the Department of Interior, Judge Gesell actually used the word "bamboozled," that he thought the United States was trying to bamboozle somebody in this thing. This submission by the United States was deemed to be an example of the United States intransigence throughout this whole suit. I don't think that can be deemed just malfeasance of an agent of the United States. Here we had an agency of the United States actively trying to do everything that it could to avoid living up to its trust responsibility. Perhaps we could draw a distinction on that basis, that if the judge can find that there has been indeed something that could be called intransigence on the part of the United States in failing to live up to its trust responsibility or indeed failing to comply with the mandate of the court, and hence dragging on the litigation, that that may be a way of limiting the burden on the taxpayer and yet not having the private litigant suffer all of the consequences of his litigation. I throw that out only as an example.

Senator TUNNEY. I am familiar with the intransigence of the Government in the *Pyramid Lake* case because I was trying to get the Attorney General of the United States to represent the Indians' interests in the matter for years, and they would not do it. I am fully familiar with that case, and I think that the Government was not only intransigent, I think that you have to say that the Government through its apathetic approach was actively denying the Indians their rights because it was well aware of what were their responsibilities. As a result of listening to the attorneys for the Indians and having had the opportunity to talk to Congressmen and Senators who were attempting to get the Government to represent those Indians' rights, the Government's course should have been clear.

Mr. BELL. I think the word apathy is a euphemism in this context, it was not apathy, it was an active role on the part of the United States to take away the Indian water.

Senator TUNNEY. If you have any further thoughts on this question of how to balance the interest of the taxpayers against the rights of the public with respect to attorneys' fees, in cases brought against the Government for nonfeasance and malfeasance of government officials. I wish you would submit them for the record. I think we are talking about a very hard difficult problem. When we try to weigh the rights of the various interests involved, we have got to be sure that we are on solid ground in suggesting any change to existing law.

I would agree with you wholeheartedly, the Indian cases are different, because you have a fiduciary relationship. What about the rights of those individuals who are living in a community in which they are going to put a freeway through and destroy their homes, their whole environment, and are forced to move away? What is to happen if there is no provision made for new housing, particularly if they are poor? The same thing is true with individuals that live along the coastline and a nuisance is going to be put in the area by the Federal Government. How do you protect these individuals? They have statutory rights but who will enforce them? If there is going to be some award of attorneys' fees against the Federal Gov-

ernment, how do we insure that the taxpayers of the country will not pay for the malfeasance, in some cases nonfeasance, of Federal officials?

Mr. BELL. Let me make one comment on that. I am not convinced when we talk about the malfeasance of an agent of the United States; that does not really aptly characterizes the activity of the United States which necessitate lawsuits to bring them in compliance with the law. If we have one agent of the United States who made a mistake at one point I think that is one thing. But when we have a policy of the United States that is running completely contrary to the law, then I think that is a completely different case. I mean it still could be deemed malfeasance but it is malfeasance on such a grandiose level and, of course, the broader the beneficiaries are of the lawsuit I think the easier it is to pin the cost on the United States.

Senator TUNNEY. I agree with that. Of course now what we are talking about is drafting of language and we have to be very precise.

Mr. BELL. Indeed. And at this particular time I can't throw out any language that would meet the problem you are suggesting at the moment. But I think when we are talking about big litigation against policies of the United States. We are not just talking about the malfeasance of one agent of the United States.

Senator TUNNEY. How is the Native American Rights Fund funded?

Mr. BELL. Principally by foundation sources. We are trying to develop a broad base of public support. We have a mail campaign. We got started by the Ford Foundation and we have significantly broadened our financial base to include many other foundations.

Senator TUNNEY. I want to congratulate you on your successful suit.

Mr. BELL. Thank you.

[The testimony resumes at page 831. Mr. Bell's prepared statement and exhibits follow:]

PREPARED STATEMENT OF L. GRAEME BELL, III, STAFF ATTORNEY,
NATIVE AMERICAN RIGHTS FUND

I appreciate the opportunity to express the views of Native American Rights Fund to this Subcommittee on 28 U.S.C. §2412, which restricts the recovery of attorneys' fees and other litigation expenses from the United States at the conclusion of lawsuits successfully challenging actions of the federal government. I will direct my testimony to the application of this statute to litigations won by Indian tribes against officials of the federal government wherein the tribes contend that such officials have violated the fiduciary duty of the United States to the plaintiff tribe. I will specifically focus on the recent decision of the United States District Court for the District of Columbia. Judge Gesell, in *Pyramid Lake Paiute Tribe of Indians v. Morton*, Civil Action Number 2506-70. I attach hereto a copy of this decision, dated June 22, 1973.

As you doubtless know, the United States has the duty to protect the often meagre resources of the American Indian tribes. Since the earliest cases involving the original inhabitants of this country, the judiciary has developed and refined this responsibility, and certainly today there can be little doubt that the United States occupies the position of the legal trustee of the assets of the American Indian tribes, who, concomitantly, are the beneficiaries of this trust. Indeed, in July 1970, President Nixon expressly acknowledged that "the United States Government acts as a legal trustee for the land and water rights of the

American Indian." The President also recognized that officers of the government acting in this fiduciary capacity have "a legal obligation to advance the interests of the beneficiaries of the trust without reservation and with the highest degree of diligence and skill."

But this fiduciary obligation has not been administered "without reservation" in all cases and at all times. Because of the United States government's responsibility to promote what it deems the "public interest," the United States is often beset with a conflict of interest in the administration of the trust responsibility owing to the American Indians. The examples of this conflict are numerous and have been canvassed and documented by the Subcommittee on Administrative Practice of the Senate Judiciary Committee.

The Pyramid Lake situation is probably the paradigm of this conflict of interest. By directive of the Department of Interior in 1859, and confirmed by an Executive Order signed by President Grant in 1874, Pyramid Lake, together with lands surrounding the Lake were reserved for the Paiute Tribe which, since time immemorial, has lived along the shores of the Lake. The Tribe's culture and welfare has always been intimately tied to the Lake and its natural fishery. Geographically, the Lake is the terminus of the Truckee River, which rises in the California Sierras, flows into Lake Tahoe, and then proceeds through Nevada to Pyramid Lake. Hence, the vitality of the Lake, as well as the Tribe, is contingent upon a sufficient inflow of water from the Truckee River to maintain the level of the Lake. On June 17, 1902, Congress passed the Reclamation Act, and by 1905, the Bureau of Reclamation of the Department of Interior, the agency principally charged with the administration of the fiduciary obligation of the United States to the Pyramid Lake Tribe, had built a dam on the Truckee River less than ten miles above Pyramid Lake to divert water from the Truckee River to service the needs of the Newlands Reclamation Project. Hence, water needed for the continued lives of the Lake and the Tribe was diverted upstream for the use of non-Indian landowners. The United States never asked the Tribe to consent to the taking of its most valuable asset, the Truckee River water. As a result of this diversion, the Lake has dropped in surface level more than 70 feet since 1906. The natural fishery of the Lake has been destroyed because the unique fish indigenous to the Lake can no longer spawn in the Truckee River. Furthermore, the decreased level has unsettled the erosion and salinity balance of the Lake to a point where the continued utility of the Lake is endangered.

In 1970, the Tribe sued the Department of Interior. Because of the Tribe's depressed economic position, the Tribe requested the assistance of Native American Rights Funds. The Fund was established in 1970 by the Ford Foundation to represent Indian tribes and Indian people on cases of major significance to Indians throughout the country. The litigation is extraordinarily complex, but the nucleus is the Tribe's contention that the Secretary of Interior was violating the trust obligation of the United States to the Tribe by diverting water to the Newlands Project in excess of the water needs, and, therefore, water rights, of the landowners, and to the great detriment of the Tribe. The litigation has continued for more than two years and already has resulted in a resounding victory for the Tribe. On November 8, 1972, Judge Gesell ruled that the Secretary of Interior had breached the trust obligation owing to the Pyramid Lake Tribe and ordered the Secretary of Interior to submit new operating plans for diversions of Truckee River water, which plans would insure that any water in excess of upstream water rights would flow into Pyramid Lake. The Secretary of Interior submitted new operating criteria to the Court, but the Court on January 11, 1973 ruled that this submission did not comport with its previous order in the litigation. The Court then called upon the plaintiff Tribe to submit operating criteria, and, after full consideration and some modifications, the Court ordered that the plaintiff's submission be adopted by the Secretary of Interior and promulgated in the Federal Register.

After the substance of this complex litigation had ended, the Tribe moved for attorneys' fees and other expenses incurred by its attorneys in connection with the litigation. Native American Rights Fund had expended on this litigation more than \$20,000 for expert witnesses, more than \$6,000 in travel and per diem expenses for its attorneys, and more than 2,000 hours of attorney time. In addition, the Tribe's general counsel, Robert D. Stitser of Reno, Nevada, had spent more than 800 hours and had expenses totalling more than \$2,500 on the suit. At the time of the filing of the motion for attorneys' fees, we were, of course, cognizant of the usual rule, codified in 28 U.S.C. §2412, that attorneys'

fees cannot be awarded against the government unless a statute so provides. We thought that recovery should be permitted notwithstanding 28 U.S.C. §2412 for two reasons.

First, pursuant to 25 U.S.C. §175, the United States, as part of its trust responsibility, has a duty to represent Indian tribes in litigations. This duty is not mandatory, but the discretion is limited by well-defined parameters. In the Pyramid Lake litigation, the United States could not provide the plaintiff with legal representation because the legality of the government's conduct was in question. We argued that where the government has not only failed to represent an Indian Tribe, but through its misconduct (breach of fiduciary obligation) has made it necessary for the tribe to litigate, at great expense, against the government to protect its rights and property, §175 should be held to authorize the award of attorneys' fees and other litigation expenses.

Secondly, we argued that the *Pyramid Lake* case and the motion for attorneys' fees and other litigation expenses are unique because the plaintiff has an independent cause of action for damages occasioned by the government's breach of fiduciary obligations. That is, whereas in the normal case, attorneys' fees are awarded as ancillary relief inseparable from the main cause of action, here the award of attorneys' fees would be predicated upon an independent theory of recovery. By failing to fulfill his fiduciary obligations, the Secretary of Interior damaged the Tribe not only by illegally diverting water away from Pyramid Lake, but also by placing the burden of litigation on the Tribe's treasury. There is no question but that the government is liable to the Tribe for damages occasioned by its breach, which in this case also included the expenses of the litigation. Given this independent theory of recovery, we argued that it would be an absurd result if the Tribe were required to bring an independent action in another court to recover attorneys' fees and other litigation expenses when the Court which had adjudicated the Pyramid Lake case was obviously the best suited to determine what that award should be. The existence of this independent basis for recovery of attorneys' fees should take this case and others of a similar nature out from under the rule that attorneys' fees cannot be awarded against the government unless a statute so provides.

The Court concluded that the provisions of 28 U.S.C. §2412 are not a bar to the claim by the Pyramid Lake Tribe against the Secretary of Interior based legitimately upon the contention that the Secretary breached his trust responsibility by unlawfully and improperly disposing of tribal assets and that in effect applicable statutes provide that in such situations an award of attorneys' fees and expenses of attorneys may be made. The Court did not focus on the second rationale discussed above, that of the independent cause of action, but instead relied on 25 U.S.C. §175, discussed above, and 25 U.S.C. §476, wherein Congress authorized American Indian tribes to employ legal counsel for the purpose of preventing, among other things, the disposition of tribal assets without the consent of the tribe. The Court recognized that 25 U.S.C. §476 permitted tribes to employ its own counsel where the United States was not able or willing to take up the tribe's cause under 25 U.S.C. §175. "Thus tribes could retain independent counsel and expect to request the Courts for award of attorneys fees under specified circumstances such as the present case." The Secretary of Interior has appealed this decision to the United States Court of Appeals for the District of Columbia.

Approaching 28 U.S.C. §2412 from a broad perspective, Native American Rights Fund suggests that this statute be amended so that a private litigant may be awarded attorneys' fees and other litigation expenses arising from a successful lawsuit against the government, which suit is necessitated by and founded on the government's failure to comply with applicable law. We suggest that the public is the true beneficiary of such a suit and for the private litigant to bear the full cost of the litigation is inequitable. From a more narrow perspective, Native American Rights Fund submits that Indian tribes should not have to carry the financial burden of forcing their trustee, the United States, to manage their resources consistent with the obligations of a trustee. Because such litigation expenses further deplete the assets of the trust, we maintain that the United States is liable for such costs. Consequently, we suggest that 28 U.S.C. §2412 be amended to clarify the jurisdiction of a court, finding that the United States has breached its trust responsibility to a plaintiff Indian tribe, to make the tribe whole by awarding it attorneys' fees and other litigation expenses from the government.

In the United States District Court for the District of Columbia
CIVIL ACTION, No. 2506-70

PYRAMID LAKE PAIUTE TRIBE OF INDIANS, DEFENDANT

v.

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR, DEFENDANT

Memorandum

Pyramid Lake Paiute Tribe of Indians has moved for attorneys' fees and other expenses incurred by its attorneys in connection with this successful litigation against the Secretary of the Interior. Although the motion is unopposed, three questions are presented to the Court for determination. First, in this an appropriate case for the award of attorneys' fees and special expenses other than normal court costs? Second, does the Court have authority to make the award sought? Third, assuming the first two matters have been determined affirmatively, what sum is reasonable to compensate counsel and reimburse for expenses claimed?

The record in this case establishes the strongest possible basis under decisions governing the discretion of an equity judge for the award of attorneys' fees and expenses. No purpose will be served by recapitulating the record in this matter which will amply support the following factual determinations.

(1) The Pyramid Lake Paiute Tribe of Indians is impoverished. The Reservation is a "depressed area" and the Tribe's legal expenses alone approximate its entire income.

(2) The Secretary of the Interior was shown to have breached his fiduciary obligation to the Tribe by a course of conduct which continued over a substantial period of time. This was to the severe detriment of the Tribe in a manner that cannot be financially compensated.

(3) In the course of these proceedings, the Secretary's representatives acted in an obdurate and intransigent manner, refusing in good faith to carry out the Court's directives, and as a consequence unnecessarily extended the litigation to the detriment of the Tribe.

(4) The determinations made in this litigation not only benefited the Tribe but in many very real respects will enhance the public interest. The litigation has given added protection to the environment in and around Pyramid Lake and it has preserved a unique natural resource. In its larger aspects it has caused a significant implementation of national policy toward Indians and encouraged the continued visibility of the Lake, thus assisting declared congressional policy.

Litigation of this character should not be burdened with expense, in order to encourage suits that so clearly enhance the public interest. *Wyatt v. Stickney*, 344 F.Supp. 387,409 (M.D.Ala.1972)

No review in detail of the decisions is necessary. The following decisions emphasize the single and combined significance of the four factors mentioned as they should govern in the award of attorneys' fees and special expenses. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Vaughan v. Atkinson*, 369 U.S. 527 (1962); *Fablonki v. United Mine Workers of America*,—U.S. App. D.C.—, 466 F.2nd 424 (1972); *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972).

A more difficult question is presented when the Court turns to a consideration of its legal authority to assess attorneys' fees and costs against the Secretary. Section 2412 of Title 28, United States Code, authorizes a judgment for costs, "not including the fees and expenses of attorneys," against an official of the United States acting in his official capacity. The usual rule, codified in §2412, is that attorneys' fees cannot be awarded against the Government unless a statute so provides. *United States v. Worley*, 281 U.S. 339 344 (1930). This provision of the Code must be read, however, in the light of the 25 U.S.C. §175 and 25 U.S.C. §476. Read together, these two provisions show that Congress

intended that the United States Attorney should represent recognized Indian Tribes in all suits at law and in equity and that as an additional safeguard Congress authorized the Tribes to employ legal counsel, "the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior," for the purpose of preventing, among other things, the disposition of tribal assets without the consent of the Tribe.

It has long been recognized that in providing the United States Attorney to assist Indians in litigation, the Congress did not make this requirement mandatory. Obviously in this instance where the Attorney General was originally named defendant and also undertook to defend the conduct of the Secretary of the Interior, his services were unavailable to the Tribe under section 175. There is no indication that the Tribe sought the approval of the Secretary of the Interior of its counsel or fees, although its right to employ counsel in this particular matter under section 476 is clear. Thus the question is presented whether 28 U.S.C. §2412 is applicable here to bar an award for attorneys' fees in the light of the obvious intention of Congress to provide recognized Tribes with the services of the United States Attorney or the services of private counsel in terms approved by the Secretary.

The background of section 476 is significant. It was passed as part of the Wheeler-Howard bill, 25 U.S.C. §§ 461. *et seq.* A reading of the congressional history indicates that Congress was conscious of the fact that Indian Tribes were confronting a dissipation of their assets or other rights because of various administrative actions and conflicting national policies. Accordingly, Congress sought to place Indians in a position to act on their own initiative in such situations to correct inequities and to facilitate presentation of their grievances to federal and state agencies. While not explicitly stated, certainly an aspect of these congressional determinations was the recognition that the Attorney General was not always able or willing to take up cudgels for the Tribes under section 175. Thus Tribes could retain independent counsel and expect to request the Courts for an award of attorneys' fees under specified circumstances such as the present case.

The Court has concluded that the provisions of 28 U.S.C. § 2412 are not a bar to a claim by the Indian Tribe against the Secretary of the Interior based legitimately on the contention that the Secretary has breached his trust by unlawfully and improperly disposing of tribal assets, and that in effect, the statutes provide in such situations that an award of attorneys' fees and expenses of attorneys may be made. It does not appear to the Court that the Tribe's motion should be denied because its choice of counsel and fees was not approved by the Secretary of the Interior. At no time in this lengthy litigation did the Secretary of the Interior raise any question as to the appropriateness of counsel and no objection has been made to the claim for fees. Whether or not this constitutes a waiver is perhaps beside the point, because, in any event, serious constitutional and policy objections can be raised if the statute is interpreted to require the Secretary of the Interior, when he is accused of breach of his fiduciary duty, to have a veto power over the Tribe's selection of attorneys or the fees they are to receive in attempting to vindicate their rights against the Secretary's improper conduct.*

Given these determinations, the Court must turn to a consideration of the appropriate award to be made for attorneys' fees and other litigation expenses. The attorneys involved have submitted by affidavits detailed itemized schedules indicating the nature of the work done from day-to-day and the number of hours logged, together with an itemized statement of various expenses. The Court has reviewed these schedules with great care in the light of the Court's knowledge of the various developments in the case and is satisfied that the time logged and expenses incurred are in all respects related to the conduct of the case, given the novelty and complexity of the issues and the numerous appearances and conferences required in Washington and elsewhere.

Mr. Stitser logged 802 hours and Mr. Peleyger, on behalf of himself and other attorneys associated with the Native American Rights Fund (NARF), shows a total of 2,032 hours, of which the bulk of the time was logged by Mr. Peleyger himself, much of it in court. As often happens, however, some of the effort was unsuccessful, particularly in the initial stages of the case where an attempt was made to join the Attorney General as a party and to revamp the complaint

* See President's July 8, 1970, Message to Congress on Indian Affairs, 116 Cong. Rec. 23131, 23135 (1970); also in H. Doc. No. 91-363, 91st Cong., 2d Sess. 9-10 (1970); *United States v. Ahtanum Irrigation District*, 236 F.2d 321, 338 (9th Cir. 1956), *cert denied*, 352 U.S. 988.

in the light of Court developments. It seems appropriate, accordingly, to discount the time logged in all instances by a factor of ten percent.

As far as the appropriate time charge is concerned, Mr. Stitser, under contract with the Tribe, has done work from time to time below his normal charges at the rate of \$30 an hour. Because the other attorneys have been employed by NARF, they are unable to show any customary time charge to be considered. Mr. Stitser was the lead attorney although much of the work was done by Mr. Pelcyger. The Court has determined to compute fees to be awarded at the rate of \$30 an hour for all attorneys, regardless of whether they did or did not log time in court. As all experienced attorneys realize, this charge, in the light of current conditions, is at the very bottom of the scale but the nature of the case and the circumstances under which the lawyers undertook the work justify the Court in fixing the fees at this bedrock minimum. Accordingly, the award to the Tribe will be for 722 hours of Mr. Stitser's time at \$30 an hour, or \$21,660, and to the NARF attorney for 1,829 hours, at \$30 an hour, or \$54,870, making a total award for attorneys' fees of \$76,530.

As far as incidental attorneys' expenses are concerned, the claim is limited to two matters: first, minimal travel expenses incurred by the attorneys attending court sessions, conferring with Government representatives, and the like. In addition, a claim is made for fees paid to expert witnesses, Woodward-Clevenger & Associates and Clyde-Criddle-Woodward, Inc. The attorneys' travel expenses are clearly appropriate and should be awarded as incidental expenses in the amount of \$2,669.92 to Mr. Stitser, and \$6,508.57 to the NARF attorneys.

A special comment or two is appropriate with respect to the fees of the expert witnesses, which include travel and expenses in the field, as well as other non-taxable costs related to the testimony given by individuals connected with the concerns retained. The outstanding qualifications of the experts was never challenged in court. The testimony they developed required detailed field experience and investigation. Much of the work performed would not have been required if the Secretary of the Interior had come forward with its experts to provide information which the Court had indicated it desired in order to resolve the issues. The plaintiff's experts played a vital role in the resolution of the case, their work and testimony going to the heart of the matter. Accordingly, it seems entirely appropriate to award their fees as scheduled in the total amount of \$20,488.72, making the award to the Tribe for all incidental expenses which are to be reimbursed by the Tribe to the claimants in the amount of \$29,667.31. An appropriate form of order carrying out these determinations is attached. The motion of the Pyramid Lake Paiute Tribe of Indians for attorneys' fees and other expenses is granted to the extent set forth above.

GERHARD A. GESELL,
United States District Judge.

In the United States District Court for the District of Columbia
Civil Action, No. 2506-70

PYRAMID LAKE PAIUTE TRIBE OF INDIANS, PLAINTIFF

v.

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR, DEFENDANT

Order

On consideration of plaintiff's motion for attorney's fees and other incidental expenses, the Court, for reasons set forth in an accompanying Memorandum, grants the motion and directs that the Secretary of the Interior shall pay to plaintiff a total sum of \$106,197.31, which amount is to be disbursed by plaintiff, upon receipt, for attorneys' fees and incidental expenses as scheduled below:

To Robert D. Stitser, Esquire.....	\$24, 329. 92
To Native American Rights Fund.....	61, 378. 57
To Woodward-Clevenger & Associates.....	19, 341. 65
To Clyde-Criddle-Woodward, Inc.....	1, 147. 07

So ordered.

GERHARD A. GESELL,
U.S. District Judge.

June 22, 1973.

In The United States District Court For The District of Columbia
Civil Action No. 2506-70

PYRAMID LAKE PAIUTE TRIBE OF INDIANS, PLAINTIFF

vs.

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR, DEFENDANT

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ATTOR-
NEYS' FEES AND EXPENSES

TABLE OF CONTENTS

Robert D. Stitser, 575 Mill Street, Reno, Nevada 89502; Robert S. Pelcyger, David H. Getches, Reid P. Chambers, Native American Rights Fund, 1506 Broadway, Boulder, Colorado 80302; and L. Graeme Bell, III, Native American Rights Fund, 1712 N Street NW, Washington, D.C. 20036; Attorneys for Plaintiff.

Introduction.

Argument:

- I. This is an appropriate case for the award of attorneys' fees and other litigation expenses:
 - A. The obdurate behavior or "bad faith" standard.
 - B. The common fund standard.
 - C. The private attorney general standard.
- II. 28 U.S.C. § 2412 is not a bar to the recovery of attorneys' fees and other litigation expenses:
 - A. 25 U.S.C. § 175.
 - B. Plaintiff has an independent cause of action for the expenses of this litigation.
- III. The administration procedure act constitutes a waiver of the government's immunity to awards of attorneys' fees and other litigation expenses.
- IV. The amount of attorneys' fees.

Conclusion.

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Fleischmann v. Maier Brewing Co., 386 U.S. 714 (1967).
Hall v. Cole, — U.S. —, 41 L.W. 4658 (May 21, 1973).
Hebah v. United States, 428 F.2d 1334 (Ct.Cl. 1970).
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Internal Improvement Fund v. Greenough, 105 U.S. 527 (1882).

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Knight v. Aneiello, 453 F.2d 852 (1st Cir. 1972).

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28 U.S.C. § 2412.

- 29 U.S.C. §§ 501 *et seq.*
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 II Scott, *The Law of Trusts* (3d Ed.), § 174, p. 1410.

INTRODUCTION

The fact that the only defendant in this action is the Secretary of the Interior, an officer of the United States, complicates this motion for the award of attorneys' fees and litigation expenses to the plaintiff.¹ Were it not for this complicating factor, plaintiff would certainly be entitled to such an award if the Court so exercised its discretion.

The first section of this memorandum will review the law relating to the award of attorneys' fees and other litigation expenses with particular attention to recent developments in cases similar to the one at bar. It will demonstrate that it would be appropriate to award the plaintiff its attorneys' fees and other litigation expenses without reference to 28 U.S.C. § 2412. Then, in the second section, plaintiff will show that § 2412 does not bar the recovery of attorneys' fees and other litigation expenses in the particular and peculiar circumstances of this case for two reasons, because of 25 U.S.C. § 175 and because of the fiduciary obligations of the defendant to the plaintiff. The third section will argue that the Administrative Procedure Act constitutes a waiver of the defendant's immunity from liability for attorneys' fees and other expenses. The fourth section will discuss the amount of attorneys' fees that should be awarded.

ARGUMENT

I

THIS IS AN APPROPRIATE CASE FOR THE AWARD OF ATTORNEY'S FEES AND OTHER LITIGATION EXPENSES

The Pyramid Lake Paiute Tribe has been forced to litigate, and to expend a large proportion of its meagre resources in so doing,² because of the misconduct of its trustee, the Secretary of the Interior. It was necessary to take the trustee to court in order to compel compliance with the trustee's fiduciary obligation to the Tribe, specifically the Secretary's obligation to protect the Tribe's precious water and fishery rights. The record before the Court and the Court's findings and conclusions establish beyond question that: (1) the trustee had mismanaged the corpus of the trust for many years;³ (2) the trustee has violated the laws of the United States⁴ and his fiduciary obligations to the Tribe⁵ and has failed to enforce two decrees of a United States District Court which are binding on the United States;⁶ and (3) the Court's

¹ See 28 U.S.C. § 2412. See, e.g., *Committee to Stop Route 7 v. Volpe*, — F.Supp. — 4 E.R.C. 1681 (D. Conn. 1972).

² See attached Affidavit of Mervin Wright.

³ 354 F. Supp. 252 at 257.

⁴ *Id.* at 256.

⁵ *Id.* at 257.

⁶ *Ibid.*

intervention was required to compel the Secretary to fulfill his legal and fiduciary obligations. Indeed, the record demonstrates the Secretary's unwillingness to take proper action to protect the Tribe's water and fishery rights even after the Court had ordered him to do so.⁷

It is difficult to conceive of a more appropriate case for the award of attorneys' fees and other litigation expenses. By mismanaging the trust, the Secretary has forced the Tribe to undertake extremely complex and expensive litigation. The Tribe can never get back the water that was illegally diverted away from Pyramid Lake because of the Secretary's misconduct. But the Tribe should be made whole for the expenses necessarily incurred in compelling the Secretary to do what he should have been doing and was legally obligated to do. *Vaughan v. Atkinson*, 369 U.S. 527 (1962).

Although the Tribe is indisputably the major beneficiary of this litigation, it is also true that the subject matter of the case, the preservation of Pyramid Lake and its fishery, is a matter of broad public importance.⁸ The nation benefits from the preservation and restoration of this "unique natural resource of almost incomparable beauty."⁹ It is therefore inequitable for the Tribe alone to shoulder the burdens of this litigation. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Yablonski v. United Mine Workers*, — U.S.App.D.C. —, 466 F.2d 424 (1972). The circle of beneficiaries is expanded even further when one considers "not only the immediate impact of the results achieved, but the implications for the future conduct" of the Secretary's handling of Indian affairs. *Yablonski*, *supra* at 431. Hopefully, the Department of the Interior, as the union in *Yablonski*, has learned its lesson.

The recent opinion of Judge Peekham in *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972) contains a thorough discussion of the case law, both reported and unreported, that has evolved, particularly since the Supreme Court's *Mills* decision in 1970, on awarding attorneys' fees and other litigation expenses in litigation designed to effectuate strong Congressional policies. *La Raza Unida* discusses three categories of court created exceptions to the general rule of not granting attorneys' fees absent express statutory authorization, obdurate behavior, common fund and private attorney general.

A. The obdurate behavior or "bad faith" standard

In its initial Memorandum Opinion, the Court found that "the Secretary's good faith is not in question."¹⁰ However, by failing to comply with the Court's Memorandum Opinion and Order in his December 29, 1972 submission, the Secretary has significantly increased the plaintiff's expenses, in terms of both attorneys' and experts' time. Since the Secretary "unyieldingly refused to perform the mandate" imposed upon him by the Court, the burden and expense of necessity fell on the plaintiff and its experts. See *Sims v. Amos*, 340 F.Supp. 691 at 694 (M.D. Ala. 1972) (three judge court), *affirmed* 34 L.Ed. 2d 215 (1972).

Also, the Secretary's refusal to accompany his initial (i.e. September 22, 1972) operating criteria with a detailed explanation of the factors or computations upon which the maximum diversion figure (378,000 acre feet) was based contributed significantly to the cost and expense of this litigation. Prior to the issuance of these initial criteria, the plaintiff had repeatedly urged the Secretary to explain how he arrived at a particular diversion figure in order to narrow the issues and define the areas of disagreement.¹¹ If the Secretary had done what the Court later ordered him to do,¹² the trial would certainly have been shortened, perhaps even eliminated.¹³ The fees of both experts and attorneys would have been significantly reduced. In view of the controlling law requiring administrators to make known the reasons for their decisions,¹⁴

⁷ See the Secretary's proposed operating criteria filed on December 29, 1972, the Plaintiff's Response filed January 10, 1973, and the Court's Order of January 11, 1973.

⁸ See, e.g., the Motions to Intervene and accompanying documents filed in this case by the Sierra Club and the League of Women Voters of Nevada.

⁹ F.Supp. at 255.

¹⁰ 354 F.Supp. at 256.

¹¹ See the letters dated August 31, 1972, September 12, 1972, and October 6, 1972 attached to the Affidavit of Robert S. Peleyger as Exhibits A, B, and C.

¹² 354 F.Supp. at 260, paragraph 4; 354 F.Supp. at 256.

¹³ It is possible, for example, that such issues as the applicability of both the *Orr Water Ditch* and *Alpine* decrees and of the June 29, 1970 contract between the Bureau of Reclamation and the Forest Service, and whether the Secretary was authorized to provide water for lands not entitled under the decrees could have been resolved on a motion for summary judgment.

¹⁴ The authorities are cited in the Court's Memorandum Opinion, 354 F.Supp. at 256.

the Secretary's conduct can accurately be classified as "obdurate" even if it does not qualify as "bad faith." See, e.g., *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 and 144 (5th Cir. 1971). On equitable principles, the defendant should bear these additional expenses.

B. The common fund standard

In general, suits against government officials do not easily fit into the common fund model. See e.g., *La Raza Unida v. Volpe*, *supra*, 57 F.R.D. at 96-97. However, one comment does appear to be warranted. The entire nation benefits from the outcome achieved in this litigation, the preservation and restoration of Pyramid Lake. It is also the United States that serves as the nation's trustee for the Pyramid Lake Tribe. The nation benefits when its obligations to Indians are met. Therefore it is appropriate, and equitable, for the costs of the litigation to be borne by the widest possible group of beneficiaries, not just by the Pyramid Lake Tribe. That purpose is, of course, achieved by the award of attorneys' fees and other litigation expenses against the defendant. In *Mills*, *supra* at 393, the Supreme Court extended the scope of the common fund justification for the award of attorneys' fees by holding that no pecuniary benefit need be demonstrated. See also the Supreme Court's most recent expression on attorneys' fees: *Hall v. Cole*, — U.S. —, 41 L.W. 4658 (May 21, 1973) which is basically a direct application of *Mills* to litigation between a labor union and one of its members under the Labor-Management Reporting and Disclosure Act of 1959.

C. The private attorney general standard

"[W]henver there is nothing in a statutory scheme which might be interpreted as precluding it, a "private attorney-general" should be awarded attorneys' fees when he has effectuated a strong Congressional policy which has benefited a large class of people, and where further the necessity and financial burden of private enforcement are such as to make the award essential." *La Raza Unida v. Volpe*, *supra*, 57 F.R.D. at 98. See *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968); *Yablonski v. United Mine Workers*, *supra*; *Knight v. Anciello*, 453 F.2d 852 (1st Cir. 1972); *Lee v. Southern Home Sites Corp.*, *supra*; *Calnetics Corp. v. Volkswagen of America, Inc.*, 353 F.Supp. 1219 (C.D. Cal. 1973).

The "private attorney general" situation plainly fits here. The Court's Memorandum Opinion took note of the strong Congressional policy, the "detailed statutory scheme for Indian affairs," as well as "the vast body of case law" which recognize and impose the obligations of a trustee on the defendant.¹⁵ This case of course revolved around the obligations of the trustee in the area of Indian water rights when the trustee is faced with a conflict of interest. That issue affects large numbers of Indians throughout the country and has recently received attention from both the Executive, from the President on down, and the Congress.

In his historic Message to Congress on Indian Affairs on July 8, 1970, the President described the nature of the problem and its importance to Indians and to the country.

"The United States Government acts as a legal trustee for the land and water rights of American Indians. These rights are often of critical economic importance to the Indian people; frequently they are also the subject of extensive legal disputes. In many of these legal confrontations, the Federal government is faced with an inherent conflict of interest. The Secretary of the Interior and the Attorney General must at the same time advance *both* the *national* interest in the use of land and water rights *and* the *private* interests of Indians in land which the government holds as trustee.

"Every trustee has a legal obligation to advance the interests of the beneficiaries of the trust without reservation and with the highest degree of diligence and skill. Under present conditions, it is often difficult for the Department of the Interior and the Department of Justice to fulfill this obligation. No self-respecting law firm would ever allow itself to represent two opposing clients in one dispute: yet the Federal government has frequently found itself in precisely that position. There is considerable evidence that the Indians are the losers when such situations arise. More than that, the credibility of the Federal government is damaged whenever it appears that such a conflict of interest exists."¹⁶

¹⁵ 354 F.Supp. at 256.

¹⁶ President's Message on Indian Affairs, 116 Cong.Rec. S.10894 at 10896 (July 9, 1970), also published 1970 U.S. Code Cong. & Admin. News, 2965 at 2972 and H. Doc. 91-363, 91st Cong., 2d Sess. at pp. 9-10. Emphases in original.

The conflict of interest in the administration of Indian affairs, particularly in the water rights context, has also been examined in great depth by the Congress. *Hearings Before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary*, U.S. Senate, 92nd Cong., 1st Sess., on Administrative Practices and Procedures Relating to Protection of Indian Natural Resources, Parts 1 through 7.¹⁷ The Senate Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs has also held hearings (on September 21, 1970) on the President's Recommendations on Indian Policy which focused on the trust responsibility and the government's conflict of interest in Indian water rights cases.¹⁸

From the Congressional hearings, it is clear that most all of the nation's Indian tribes face problems very similar to the issues that plagued the Pyramid Lake Tribe for so long and were finally litigated in this case.¹⁹ It is also clear that the Pyramid Lake problem is viewed as representative or symbolic of the problems of all the tribes. In his testimony before the Senate Subcommittee on Indian Affairs, then Secretary Hickel cited Pyramid Lake as "a good example of such a conflict of interest" (p. 229).²⁰ Senator McGovern, the Chairman of the Subcommittee, referred to Pyramid Lake as the "outstanding example of the conflict of interest situation" (p. 231). Later Secretary Hickel called it "a perfect example of that internal conflict" (p. 231).

The point of all of this is that the outcome of this case should contribute to the resolution of many other controversies involving Indian natural resources by its determination of the standards applicable to the discharge if the government's responsibility. "Judgment calls" and unreasoned decisions have, we hope, been eliminated from the Interior Department's manual of operations. There is indeed a very large class of people who stand to benefit from this litigation.

In addition to the purely Indian aspects of this case, numerous other Congressional policies were effectuated by its outcome including:

- (1) The protection of endangered species;²¹
- (2) An end to the senseless waste of precious water resources;²²
- (3) Preservation of a unique natural resource of almost incomparable beauty;²³
- (4) Enhancement of outdoor recreational opportunities for a vast number of Americans;²⁴ and
- (5) Curtailing the pollution, through increased salinity, of America's most beautiful desert lake.²⁵

Moreover, this is not a case in which the "public interest" can be said to be splintered as between, for example, economic and environmental and energy considerations. There are no adverse consequences of enjoining the waste of water. The Newlands Project will continue to receive all the water it needs.

In short, the ecological balance of one of America's major river systems has been restored and the government has been ordered to fulfill its fiduciary obligations to the Pyramid Lake Tribe. We think this case clearly meets the test of benefitting a large class of people, both Indian and non-Indian, by effectuating numerous interrelated, strong, Congressional policies.

¹⁷ We are lodging a copy of these volumes with the Clerk. The Subcommittee held hearings on the Pyramid Lake Reservation which deals exclusively with the Pyramid Lake problem (Volume 6). Hearings were also held in Washington, D.C. (Volumes 1 and 2), Window Rock, Arizona (Volume 3), Albuquerque, New Mexico (Volume 4), Phoenix, Sacaton and Parker, Arizona (Volume 5), and Sacramento, California (Volume 7).

¹⁸ These hearings have not been published but the Senate Subcommittee on Administrative Practice and Procedure has printed a small excerpt of the testimony, *supra*, Part 1, pp. 228-232.

¹⁹ During the Washington, D.C. hearings alone, representatives of over thirty-five tribes testified before the Senate Subcommittee as well as several representatives of national or regional Indian organizations. Virtually every witness detailed at least one instance in which Indians were victimized by the trustee's failure to fulfill its fiduciary obligations. The Subcommittee also published a paper by Professor Reid Peyton Chambers entitled "A Study of Administrative Conflicts of Interest in the Protection of Indian Natural Resources" (at pp. 233-249) in which eight actual case studies (including Pyramid Lake) are documented. The same pattern is repeated during the field hearings.

²⁰ This and subsequent page references are to the hearings of the Senate Subcommittee on Administrative Practice and Procedure, *supra*.

²¹ 354 F.Supp. at 255, 16 U.S.C. §§ 668bb(d) and 742a.

²² 43 U.S.C. § 372.

²³ 354 F.Supp. at 255; see 42 U.S.C. §§ 4321 *et seq.*, the National Environmental Policy Act.

²⁴ 16 U.S.C. § 460e.

²⁵ 354 F.Supp. at 255, 33 U.S.C. § 466(a).

The final element needed to qualify for attorneys' fees under the "private attorney general" theory is that the award of such fees is essential because of the necessity for, and the financial burden of, private enforcement. Obviously, there is no alternative to private enforcement of the government's fiduciary obligations to Indian tribes because the government is the wrongdoer, the defendant. Until the enactment of the President's bill to establish a government funded but independent Indian Trust Council Authority²⁶ or a similar entity is established, private enforcement in litigation initiated by Indian tribes is a necessity.

It is equally obvious that this kind of litigation is beyond the financial capacity of most all Indian tribes. The extreme poverty prevalent among Indians is a fact so well known as to be judicially noticeable.²⁷ Also, as this litigation so aptly demonstrates, natural resources litigation against the government is complex and expensive. Indeed, the financial burdens of the litigation combined with the poverty of most Indian tribes probably account for the fact that in spite of the numerous documented instances of governmental conflicts of interest and consequent mishandling of Indian trust property, there has been very little actual litigation in this field. This case stands virtually alone in seeking to prevent continued dissipation of trust property by the trustee. By way of contrast, Indian cases against the government seeking monetary relief as compensation for lost assets abound.²⁸ Clearly, the award of attorneys' fees in this kind of litigation would have the salutary effect of helping to reverse the historical pattern of governmental activity bringing about the involuntary transfer of Indian property to non-Indians, what the Ninth Circuit Court of Appeals has aptly termed "a gross national hypocrisy."²⁹

For these reasons, this case fits perfectly into the "private attorney general" category. The award of attorneys' fees and other litigation expenses is not only permissible in such cases, but may be required to effectuate national policy. See *NAACP v. Allen*, 340 F.Supp. 703 at 709 (M.D. Ala. 1972) ("the award loses much of its discretionary character and becomes a part of the effective remedy a court should fashion to encourage public-minded suits and to carry out congressional policy"); *Wyatt v. Stielney*, 344 F.Supp. 387 at 409 (M.D. Ala. 1972) ("in order to eliminate the impediments to *pro bono publico* litigation and to carry out congressional policy, an award of attorneys' fees not only is essential but also is legally required"). Or, as stated in *La Raza Unida v. Volpe*, *supra*, 57 F.R.D. at 101, "To force the private litigants to bear their own costs here would be tantamount to a penalty, and it seems somewhat inequitable to punish litigants who have policed those charged with implementing and following Congressional mandates." See also *Vaughan v. Atkinson*, *supra*, applying the same principle in an admiralty context.

²⁶ See the President's July 8, 1970 Message to Congress, *supra* n. 16, and S.4165 (92nd Cong.).

²⁷ See, e.g., President's Message to Congress on Indian Affairs, *supra* n. 16.

²⁸ See, e.g., cases annotated under 28 U.S.C. § 1505 and 25 U.S.C. §§ 70 *et. seq.* and such pre-Indian Claims Commission Act cases, for which special jurisdictional acts were necessary, such as *Seminole Nation v. United States*, 316 U.S. 286 (1942), *Sioux Tribe v. United States*, 316 U.S. 317 (1942), and *United States v. Alcea Band of Tillamooks*, 329 U.S. 40 (1946) and 341 U.S. 48 (1951). See generally Cohen, *Federal Indian Law* 373-378 (1942 edition, University of New Mexico Press).

²⁹ *United States v. Ahtanum Irrigation District*, 236 F.2d 321 at 338 (9th Cir. 1956), *cert. denied* 352 U.S. 988. For the sequel see the same case at 330 F.2d 897 (9th Cir. 1964) and 338 F.2d 307 (9th Cir. 1964), *cert. denied* 381 U.S. 924. The *Ahtanum* case was concerned with the validity of a 1908 water contract executed by the Secretary of the Interior "on behalf of the Yakima Indians" which conveyed three-fourths of the Indians' water to non-Indian settlers adjacent to the Reservation. The Court saw the contract in the context of the nation's historical treatment of Indians which it described eloquently as follows:

"Viewing this contract as an improvident disposal of three-fourths of that which justly belonged to the Indians, it cannot be said to be out of character with the sort of thing which Congress and the Department of the Interior has [sic] been doing throughout the sad history of the Government's dealings with the Indians and the Indian tribes. That history largely supports the statement: 'From the very beginnings of this nation, the chief issue around which federal Indian policy has revolved has been, not how to assimilate the Indian nations whose lands we usurped, but how best to transfer Indian lands and resources to non-Indians.'"

"The numerous sanctimonious expressions to be found in the acts of Congress, the statements of public officials, and the opinions of courts respecting "the generous and protective spirit which the United States properly feels toward its Indian wards", and the "high standards for fair dealing" required of the United States in controlling Indian affairs", are but demonstrations of a gross national hypocrisy." 236 F.2d at 337-338 (footnotes and citations omitted).

The penalty aspect is even greater in this case because the trustee's misconduct has brought about a substantial diminution of the corpus of the trust. It was the illegal conduct of the Secretary, the Tribe's trustee, that made this litigation necessary. In a sense, although the Tribe was successful in recovering a portion of its trust corpus, its invaluable water and fishery rights, it was accomplished only at the expense of another portion of its trust assets, a significant part of the tribal treasury. The trustee's illegal conduct should not force the beneficiary into a Hobson's choice between expenditure of trust funds or acquiescence in the loss of trust water and fishery rights. The Tribe should be made whole by full restoration of the corpus of the trust, that is, a surcharge should be imposed upon the trustee to compensate the beneficiary for its mismanagement.

Here, the plaintiff itself paid directly for the services of one of its attorneys, Robert D. Stitser, while its other attorneys are employees of the Native American Rights Fund who require fees from their clients only when there is an inability to pay, as in the case of court awarded fees. However, the particular arrangements between a client and his attorneys are not material to the award of attorneys' fees. Clients represented by so-called public interest law firms are awarded attorneys' fees on an equal footing with attorneys paid directly by their clients. *Newman v. Piggie Park Enterprises, Inc.*, *supra*; *Miller v. Amusement Enterprises, Inc.*, 426 F.2d 534, 538 (5th Cir. 1976); *Lea v. Cone Mills Corp.*, 438 F.2d 86, 88 (4th Cir. 1971); *Clark v. American Marine Corp.*, 320 F.Supp. 709 (E.D. La. 1979), *affirmed* 437 F.2d 959 (5th Cir. 1971); *La Raza Unida v. Volpe*, *supra*, 57 F.R.D. at 98. As stated in *Clark v. American Marine Corp.*, *supra*, 320 F.Supp. at 711:

"Nor does it matter that some, or even perhaps a major part, of plaintiffs' counsel came from a lawyer who was on the staff of the NAACP Legal Defense and Educational Fund., Inc. . . . [T]he statute does not prescribe the payment of fees to the lawyers. It allows the award to be made to the prevailing party. Whether or not he agreed to pay a fee and in what amount is not decisive. . . . The criterion for the court is not what the parties agreed but what is reasonable."

Since this case could only have been brought by a private party and achieved the effectuation of strong public policies which will benefit numerous people, it is an appropriate one for the award of attorneys' fees and other expenses of litigation.³⁰ *La Raza Unida v. Volpe*, *supra*, 57 F.R.D. at 98.

II

28 U.S.C. §2412 IS NOT A BAR TO THE RECOVERY OF ATTORNEYS' FEES AND OTHER LITIGATION EXPENSES

28 U.S.C. § 2412 authorizes a judgment for costs, "not including the fees and expenses of attorneys," against an official of the United States acting in his official capacity. The usual rule, codified in § 2412, is that attorneys' fees cannot be awarded against the government unless a statute so provides. *United States v. Worley*, 281 U.S. 339, 344 (1930).

There are two reasons why the plaintiff is not precluded from recovering attorneys' fees and other expenses against the government here. Recovery should be permitted because of 25 U.S.C. § 175 and/or because the plaintiff would have an independent cause of action for breach of fiduciary obligations against the government.

A. 25 U.S.C. § 175.

This statute provides:

"In all States and Territories where there are reservations or allotted Indians the United States attorney shall represent them in all suits at law and in equity."

The United States could not provide the plaintiff with legal representation in the form of United States attorneys because the legality of the government's conduct was at issue and the government's attorneys represented the defendant. In these circumstances, particularly where, as here, the litigation was occasioned by the government's breach of its fiduciary obligations to an Indian tribe, plaintiff believes that § 175 provides the requisite authority for the award of attorneys' fees against the government.

³⁰ The major expense other than attorneys' fees claimed in this motion is the fees of expert witnesses. This expense is governed by the same considerations that apply to the award of attorneys' fees. *La Raza Unida v. Volpe*, *supra*, 57 F.R.D. at 102.

The only case known to the plaintiff in which § 175 was urged as a basis for the award of attorneys' fees is *United States v. Gila River Pima-Maricopa Indian Community*, 391 F.2d 53 (9th Cir. 1968). This case was brought by the United States to condemn certain interests in Indian lands for military purposes. The District Court had awarded attorneys' fees to the defendant tribe relying on § 175. The Court of Appeals reversed, holding, "with regret," that § 175 did not constitute a sufficient authorization for the award of attorneys' fees given the facts of that case. The *Gila River* case is distinguishable on at least four grounds.

First, it was decided before the significant changes in the law regarding the imposition of attorneys' fees sparked by *Newman v. Piggie Park Enterprises, Inc.*, *supra*,³¹ and *Mills v. Electric Auto-Lite Co.*, *supra*. Without exception, every case dealing with attorneys' fees cited in part I of this Memorandum was decided during the past three years. There can be no question but that the entire climate of opinion regarding the power and right of a court of equity to award attorneys' fees has shifted so that such awards are now looked upon as the rule rather than the exception in public interest litigation. When *Gila River* was decided, the usual rule was that plaintiffs were to be awarded attorneys' fees "only to the extent that . . . defenses had been advanced 'for purposes of delay and not in good faith.'" *Newman v. Piggie Park Enterprises*, *supra* at 401.³²

Second, in *Gila River* the government was fulfilling a proper governmental function in bringing the suit. It is true that the government was involved in a conflict of interest situation but the conflict was inevitable and there was nothing improper about it. In this case, by contrast, the government acted improperly, in violation of both its fiduciary obligations to the plaintiff and its duty to prevent waste of water, and it was this misconduct that precipitated this litigation. If the government had acted properly, this suit would not have been necessary and the plaintiff would not have had to expend its meagre resources for this purpose.

Third, in *Gila River* the government actually bestowed some benefits by compensating the tribe for the use of its land. It is not inequitable for the tribe to pay for its attorney out of the proceeds of the condemnation award. Indeed, contingency fee arrangements of this kind in condemnation cases are frequent. The tribe had the option of accepting the government's offer and not litigating. Here, there is no award of damages. The plaintiff is required to finance this litigation from sources of income unrelated to this case. And the tribe had no choice but to litigate in order to protect its water and fishery rights from continued destruction and infringement by the government.

Fourth, and perhaps most importantly, the *Gila River* case does not satisfy any of the criteria that have developed over the years for awarding attorneys' fees. There was no bad faith or obdurate behavior on the part of the government nor was there a common fund situation. And the "private attorney general" model did not fit since the case did not involve the effectuation of strong (indeed any) Congressional policies, nor did it benefit a large class of people.

This case then poses the § 175 argument in the strangest possible context for the award of attorneys' fees to an Indian tribe. Where the government has not only failed to represent an Indian tribe, but through its misconduct (breach of fiduciary obligations) has made it necessary for the tribe to litigate, at great expense, against the government to protect its rights and property, § 175 should be held to authorize the award of attorneys' fees and other litigation expenses.

B. Plaintiff has an independent cause of action for the expenses of this litigation

This case, and this motion for attorneys' fees and other litigation expenses, is unique because plaintiff has an independent cause of action for damages occasioned by the government's breach of its fiduciary obligations. That is, whereas in the normal case attorneys' fees are awarded as ancillary relief inseparable from the main cause of action, here the award of attorneys' fees are predicated upon an independent theory of recovery. By failing to fulfill his fiduciary obligations, the Secretary damaged the Tribe not only by illegally

³¹ The *Gila River* case was decided by the Ninth Circuit on March 6, 1968, twelve days before the Supreme Court *per curiam* decision in *Newman* came down.

³² Actually, the change in the law that is most relevant to this case (and to *Gila River*) did not come until the *Mills* decision in 1970 because *Newman* turns on a statute specifically authorizing attorneys' fees. *Mills* did not.

diverting water away from Pyramid Lake, but also by placing the burden of this litigation on the Tribe's treasury. There is no question but that the government is liable to the Tribe for the damages occasioned by its breach, which in this case includes the expenses of this litigation. *Vaughan v. Atkinson*, *supra*. See the Supreme Court's comment on the *Vaughan* case in *Fleischmann v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967) which draws the distinction between awarding counsel fees as an item of compensatory damages and as a separate cost to be taxed. Given this independent theory of recovery, it would be an absurd result if the Tribe were required to bring an independent action in another court to recover attorneys' fees and other litigation expenses when this Court is obviously best suited to determine what that award should be.

The existence of this independent basis for recovery of attorneys' fees should take this case out from under the rule that attorneys' fees cannot be awarded against the government unless a statute so provides. In fact, the Tribe has a separate and independent cause of action for attorneys' fees, obviating the necessity for an Act of Congress.

That the Tribe does have a right of action against the government for damages for breach of fiduciary obligation is amply supported. 28 U.S.C. § 1505 (see Act of May 24, 1949, 63 Stat. 102, amending § 24 of the Act of August 13, 1946, 60 Stat. 1049 at 1055); *Seminole Nation v. United States*, 316 U.S. 286 (1942); *Navajo Tribe of Indians v. United States*, 364 F.2d 320 (Ct. Cl. 1966);³³ *Menominee Tribe of Indians v. United States*, 101 Ct.Cl. 10 (1944); *Hebah v. United States*, 428 F.2d 1334 (Ct.Cl. 1970); *Mason v. United States*, 461 F.2d 1364 (Ct.Cl. 1972). certiorari granted 41 U.S.L.W. 3391-3392 (January 15, 1973).

The *Mason* case is particularly instructive. The United States was held liable to the estate of a restricted Osage Indian for breach of fiduciary duty because it paid inheritance taxes to the State of Oklahoma from funds of the estate, as required by the Supreme Court's decision in *West v. Oklahoma Tax Commission*, 334 U.S. 717 (1948). The Court of Claims held that proper conduct for the fiduciary would have been to attempt to overrule *West* because intervening decisions of the Supreme Court, lower federal courts and executive agencies made *West*'s continuing validity suspect.

The government has argued in its Supreme Court brief³⁴ that the fiduciary standard imposed by the Court of Claims was too severe, "something akin to an insurer's absolute liability rather than to the standard of good faith competence applicable to trustees in general."³⁵ But the government admits in its brief that the government is liable to the Indian beneficiary in a suit in the Court of Claims for damages arising from its administration of Indian affairs when its conduct is "unreasonable," when the government fails to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property.³⁶

The conduct of the government disclosed in the record before this Court fails to meet even the most minimal fiduciary standards. This Court so held, describing the challenged Secretarial action as "unlawful,"³⁷ "arbitrary,"³⁸ "capricious,"³⁹ "an abuse of discretion,"⁴⁰ and "defective and irrational because it fails to demonstrate an adequate recognition of his fiduciary duty to the Tribe."⁴¹ In short, the government's conduct here does not come close even to meeting the standards it admits are applicable in its *Mason* brief, to say nothing

³³ Both *Seminole* and *Navajo Tribe* were cited and relied upon in the Court's November 8, 1972 Memorandum Opinion, 354 F.Supp. at 256.

³⁴ Appended to this Memorandum as Exhibit A.

³⁵ Government's Brief, pp. 12-13.

³⁶ Government's Brief, p. 7. It is certainly arguable, and we are sure that the respondents in *Mason* will argue, that the government should be held to a higher standard of care and skill than "the man of ordinary prudence." See, e.g., II Scott, *The Law of Trusts* (3d Ed.), § 174, p. 1410:

"It may be, however, that a particular trustee has greater skill or more facilities than those of the ordinary prudent man. In such a case he is under a duty to exercise the skill that he has and to employ the facilities which are available to him. If he is in a position to do better than the ordinary man, it is not enough to do what the ordinary man would do."

At any rate, this is the issue that the Supreme Court will soon resolve. For the purposes of this case, however, the difference in standards is only of academic interest since the government's conduct violated even the minimal standards applicable to trustees. See the accompanying text.

³⁷ 354 F.Supp. at 260, paragraph 1; 354 F.Supp. at 257 and 258.

³⁸ 354 F.Supp. at 256 and 258.

³⁹ *Id.* at 256.

⁴⁰ *Id.* at 257 and 258.

⁴¹ *Id.* at 257.

of the more stringent standards to which it was held by the Court of Claims.

Given the government's breach of its fiduciary obligations to the Tribe, its liability for the Tribe's expenses, including attorneys' fees, incurred in restoring and preserving the corpus of the trust, necessarily follows. Indeed, the leading Supreme Court case on the award of attorneys' fees in the common fund situation involved exactly this situation, *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939), same case on remand, 28 F.Supp. 229 (D. Maine 1939), 110 F.2d 174 (1st Cir. 1940). Another leading case discussed and approved in *Sprague*, 307 U.S. at 169, also on point is *Internal Improvement Fund v. Greenough*, 105 U.S. 527 (1882). *United States v. Equitable Trust Co.*, 283 U.S. 738 (1931) awarded attorneys' fees in a suit brought by an Indian's next friend to recover the Indian's trust property which the Secretary of the Interior had illegally permitted to be taken away from him. The fees came out of funds held by the United States.

It is basic black letter law that:

"Where litigation respecting an express trust was necessitated or occasioned by some fault or misconception of duty on the part of the trustee, the courts tend to impose any allowance made for costs or attorneys' fees upon the trustee individually."

Annotation, "Allowance of attorneys' fees in, or other costs of, litigation by beneficiary respecting trust," 9 A.L.R. 2d 1132 at 1243. See cases cited at 9 A.L.R. 2d 1243 *et seq.* and 1249 *et seq.* The following federal court cases confirm and follow this rule: *Crutcher v. Joyce*, 146 F.2d 518 (10th Cir. 1945); *Wolff v. Calla*, 228 F.Supp. 891 (E.D. Pa. 1968); *Cleveland v. Second National Bank & Trust Co.*, 149 F.2d 466 (6th Cir. 1945); *Terander v. Ruysdael*, 299 F. 746 (7th Cir. 1924). See also *Re Bausch's Estate*, 115 N.Y.S.2d 278, 280 App.Div. 482 (1952).

Attorneys' fees have been awarded as an independent measure of damages⁴² in analogous circumstances. In *Kerr v. City of Chicago*, 424 F.2d 1134 (7th Cir. 1970), *cert. denied* 400 U.S. 833, and *United States v. McLeod*, 385 F.2d 734 (5th Cir. 1967), attorneys' fees were awarded as an integral part of plaintiff's damages, just as medical expenses are included as an element of damages in personal injury actions. Both of these cases involved infringement on the plaintiffs' civil rights by local government officials. They hold that such plaintiffs are entitled to recover attorneys' fees incurred as a foreseeable result of the wrongful and illegal acts of the defendant. *Kerr v. City of Chicago*, *supra*. 424 F.2d at 1141. Judge Wisdom's statement in *United States v. McLeod*, *supra*, is equally applicable here.

"In order to grant full relief in this case, we must see that as far as possible the persons who were arrested and prosecuted in violation of [law] are placed in the position in which they would have stood had the county not acted unlawfully. Only in this manner may we be sure that the possibility of unlawful arrest and prosecution will not deter Negroes from participating in the voting process. . . . The Court can and must, however, do all within its power to eradicate the effect of the unlawful prosecutions in this case. We therefore hold that the district court should enter an order requiring the appropriate officials of Dallas County to return all fines, and to expunge from the record all arrests and convictions resulting from the prosecutions which form the basis for these suits. The individuals so prosecuted would not have had to bear the costs of their defense had these prosecutions been enjoined as they should have been. The district court's order should therefore include a requirement that the county reimburse the individuals involved for the costs, including reasonable attorneys' fees, incurred in the defense of the state criminal prosecutions." 385 F.2d at 749-750.

Similarly, the award of attorneys' fees is necessary to make the plaintiff whole, so that it is placed in the position in which it would have stood had the government not acted unlawfully. The Tribe would not have had to bear the expenses of this litigation if the government had fulfilled its fiduciary obligations. *Kerr* and *McLeod* certainly stand for the proposition that the plaintiff is entitled to recover as damages attorneys' fees and other litigation expenses incurred as a foreseeable result of the defendants' wrongful and illegal conduct. See also *Vaughan v. Atkinson*, *supra*. The case is obviously far more compelling when the defendant stands in a fiduciary relationship with the plaintiff.

⁴² The phrase "independent measure of damages" in this context is used by way of contrast to the award of attorneys' fees as relief ancillary to another cause of action.

Another category of cases also supports the plaintiffs' right to recovery. They involve Title V of the Labor-Management Reporting and Disclosure Act (the "Landrum-Griffin Act"), 29 U.S.C. § 501. The relevant cases are *Bakery and Confectionery Workers International Union v. Ratner*, 118 U.S.App.D.C. 269, 335 F.2d 691 (1964); *Retail Clerks Union, Local 648 v. Retail Clerks Int. Ass'n*, 299 F.Supp. 1012 (D. D.C. 1969) and *Cefalo v. International Union of Dist. 50 United Mine Workers*, 311 F.Supp. 946 (D. D.C. 1970). See also *Hall v. Cole*, *supra*.

Title 29 U.S.C. § 501(a) establishes a trust relationship between the officers of a labor organization and its members. Pursuant to 29 U.S.C. § 501(b), any member of a labor organization may bring suit in federal district court against union officials alleged to have violated their trust responsibilities. Section 501(b) further provides that "the trial judge may allot a reasonable part of the recovery in any [such] action . . . to pay the fees of counsel prosecuting the lawsuit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation."

Defendants in Title V action have argued that attorneys' fees awarded pursuant to § 501(b) are limited to a reasonable part of a monetary "recovery." In rejecting that contention, this Court and the Court of Appeals for this Circuit have relied on the breach of trust aspects of the plaintiffs' cases.

"Congress in section 501(a) has defined the fiduciary status of union officers. They are to execute their trust for the benefit of the organization and its members. Should such officers violate their trust, a member of the union is authorized under section 501(b) to initiate steps looking toward remedial action. . . .

. . . [T]he accomplishment of benefits to the membership as "appropriate relief" might well be achieved under court authority without monetary "recovery" as such. The payment of fees and reimbursement of expenses incurred became the obligation of the International under traditional equitable principles which were simply called into play pursuant to the authorization for action under section 501. The claimed limitation relied upon by the appellant does not exclude the International's liability for reasonable fees, properly earned. Rather the language is permissive. It means no more than this: where a monetary recovery has in fact been achieved, that fund may constitute a source from which the trial judge "may allot a reasonable part" for the payment of counsel fees and disbursements.

Bakery and Confectionery Workers International Union v. Ratner, *supra*, 335 F.2d at 696-697.

The cases awarding attorneys' fees in Title V actions hold, in essence, that violations of § 501(a) trust obligations give rise to a "traditional, equitable" entitlement to attorneys' fees and to reimbursement of expenses even where damages are not sought. The permissive language of § 501(b) is construed so as not to interfere with or otherwise limit this traditional equitable relief. The same traditional and equitable principles give rise to the Tribe's cause of action against the Secretary for recovery of its attorneys' fees and litigation expenses incurred in remedying the Secretary's breach of trust.

The existence of this independent cause of action for damages occasioned by the Secretary's breach of trust takes this case out from under the rule requiring specific statutory authorization for awarding attorneys' fees against the government. At least part of the justification for requiring statutory authorization is the rule that public monies cannot be paid out unless there is an appropriation by Congress. Here there is already Congressional consent to awarding the plaintiff damages occasioned by the government's breach of its fiduciary obligations. 28 U.S.C. §§ 1491 and 1505, *Mason v. United States*, *supra*, *Menominee Tribe v. United States*, 101 Ct.Cl. 10 (1944), *Navajo Tribe v. United States*, *supra*.⁴³ There is no need for any more express authorization. Hence,

⁴³ An alternate jurisdictional basis is the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2674 and 2680, pursuant to which the federal district courts have jurisdiction to award money damages against the United States caused by the "negligent or wrongful act or omission" of any government employees (§ 1346(b)) "in the same manner and to the same extent as a private individual [would be liable] under like circumstances" (§ 2674). See, e.g., *Rayonier Inc v. United States*, 352 U.S. 315 (1957), holding the United States liable for the negligence of Forest Service employees in failing to control a fire, and *Swanner v. United States*, 309 F.Supp. 1183 (M.D. Ala. 1970), 406 F.2d 716 (5th Cir. 1969), holding the United States liable for breach of its special duty to use reasonable care to protect an employee whom it has reasonable cause to believe is endangered as a result of the performance of his governmental duties. These cases suggest that the government would be liable for its negligent mismanagement of its special fiduciary duties to the Tribe in the same manner and to the same extent as a private trustee under like circumstances.

the usual rationale for denying the award of attorneys' fees against the government has no application here.

Plaintiff contends that this Court has jurisdiction to award attorneys' fees against the government as part of its inherent equitable powers once it is determined that 28 U.S.C. § 2412 does not bar such a result. That is, no specific statutory grant of jurisdiction is necessary to support an award of attorneys' fees. See *State of Utah v. United States*, 304 F.2d 23 (10th Cir. 1962); *Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70 (1927); *Sims v. Amos*, *supra*; *La Raza Unida v. Volpe*, *supra*, 57 F.R.D. at 101-102, n. 11. However, should the Court determine that an affirmative grant of jurisdiction is essential to award attorneys' fees and other litigation expenses in the peculiar circumstances presented here, it would still be appropriate for this Court to determine the amount of that award. With such a declaration from this Court, the plaintiff would then be able to invoke the jurisdiction of the Court of Claims pursuant to 28 U.S.C. §§ 1491 and 1505⁴⁴ or of a federal district court pursuant to 28 U.S.C. § 1346(b) to enforce the judgment. This Court is obviously best suited to determine what constitutes a proper award for attorneys' fees and other litigation expenses in this case. It would be senseless to litigate this issue anew in the Court of Claims or any other court.

III

THE ADMINISTRATIVE PROCEDURE ACT CONSTITUTES A WAIVER OF THE GOVERNMENT'S IMMUNITY TO AWARDS OF ATTORNEYS' FEES AND OTHER LITIGATION EXPENSES

The rationale for not awarding attorneys' fees and other litigation expenses, or, for that matter, even taxable costs against the government, in the absence of statutory authorization, ultimately traces to its sovereignty. See *Fairmont Creamery Co. v. Minnesota*, *supra*; *United States v. Chemical Foundation*, 272 U.S. 1, 20 (1926). It follows that a statute waiving the government's sovereign immunity from suit also waives its immunity from liability for costs and attorneys' fees. *Reconstruction Finance Corp. v. J. G. Menihan Corp.*, 312 U.S. 81 (1941).

The Court of Appeals for this Circuit has held that the Administrative Procedure Act constitutes an unequivocal waiver of sovereign immunity. *Scanwell Laboratories, Inc. v. Shaffer*, 137 U.S.App.D.C. 371, 424 F.2d 859, 873-874 (1970). Applying the reasoning of *Reconstruction Finance Corp. v. J. G. Menihan Corp.*, *supra*, to the waiver effectuated by the A.P.A. requires a holding that the Act also waives the government's immunity from liability for costs and attorneys' fees, thus placing "[the government] upon an equal footing with private parties as to the usual incidents of suits in relation to the payment of costs and allowances." 312 U.S. at 85-86.

Because *Reconstruction Finance Corp. v. J. G. Menihan Corp.* is so central to this argument, and so controlling, it merits further discussion. The Reconstruction Finance Corporation (R.F.C.) purchased certain property of a corporation, including its trademarks, and then sued the Menihan Corporation to enjoin its use of the trademarks. R.F.C. lost the suit, but the district court denied Menihan's application for costs and other allowances. The Court of Appeals for the Second Circuit reversed the denial of the application and the Supreme Court unanimously affirmed.

"Congress has expressly provided that the Reconstruction Finance Corporation shall have power 'to sue and be sued, to complain and to defend, in any court of competent jurisdiction, State or Federal.' There is nothing in the statutes governing its transactions which suggests any intention of Congress that in suing and being sued the Corporation should not be subject to the ordinary incident of unsuccessful litigation in being liable for the costs which might properly be awarded against a private party in a similar case." 312 U.S. at 83.

Similarly, there is nothing in the Administrative Procedure Act to suggest any intention of Congress that "in being sued" governmental agencies should not be liable for the ordinary incidents of successful litigation. And these incidents, the Supreme Court held, include both taxable costs and attorneys' fees. 312 U.S. at 85.

⁴⁴ This Court has concurrent jurisdiction with the Court of Claims over claims not exceeding \$10,000 against the United States. 28 U.S.C. § 1346(a)(2).

The Court followed the rule that waivers by Congress of governmental immunity from suit should be liberally construed—"that being in line with the current disfavor of the doctrine of governmental immunity." 312 U.S. at 84.

"We apply the principle that there is no presumption that the agent is clothed with sovereign immunity. We look . . . to see whether Congress has endowed [the R.F.C.] with that immunity and we find no indications whatever of such an intent. We apply the farther principle that the words "sue and be sued" normally include the natural and appropriate incidents of legal proceedings." 312 U.S. at 85.⁴⁵

Identical principles apply here. The Administrative Procedure Act, like the legislation establishing the R.F.C., waives the government's immunity from suit. *Seamwell Laboratories v. Shaffer*, *supra*. As a corollary to that waiver of sovereign immunity, courts have the authority to award costs, attorneys' fees and other litigation expenses against the government in appropriate cases brought under the A.P.A. When interpreting a statute to permit the award of attorneys' fees is consistent with, and indeed helps to effectuate the Congressional purpose, the courts will not construe the statute to circumscribe their power to grant appropriate remedies. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 at 390-391 (1970).

As reviewed above, there could not be a more appropriate case for such an award than this case. Awarding attorneys' fees and other litigation expenses in A.P.A. cases would, of course, strengthen immeasurably the legislative purpose of encouraging judicial review of agency action. See, *e.g.*, *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), *Barlow v. Collins*, 397 U.S. 159 (1970), and *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). See also *The Allocation of Fees after Mills v. Electric Auto-Lite Co.*, 38 U. CHI. L. REV. 316 at 329-330 (1971).

IV

THE AMOUNT OF ATTORNEYS' FEES

The Affidavit of Robert D. Stitser lists the number of hours billed to his client for his services provided in connection with this litigation. As stated in his affidavit, the Tribe was billed at the rate of \$30.00 per hour for these services. Mr. Stitser's usual billing rate is higher. He bills the Tribe at a reduced rate because its cause is worthy, its needs great, and its income meagre.

The Affidavit of Robert S. Peleyger lists the estimated hours expended by attorneys employed by the Native American Rights Fund in connection with this litigation, but does not place a dollar value on those efforts.

The plaintiff will defer completely to the Court's judgment in placing a value on all of their attorneys' efforts. Hours expended are, of course, only one of the factors considered by the courts in awarding fees. The pertinent factors that courts have considered in fixing the dollar value of attorneys' efforts appear generally to be the following:

- (1) The time and labor required on the case;
- (2) The benefit to the public of encouraging legitimate suits;
- (3) The benefit to the public of the particular case;
- (4) The skill demanded by the novelty, complexity and intricacy of the issues;
- (5) The skill of the opposition;
- (6) The skill actually demonstrated by the lawyers whose fees are being set; and

⁴⁵ *Reconstruction Finance Corp. v. J. G. Menihan Corp.* was cited and relied on recently by both the majority and dissent in *N.L.R.B. v. Nash-Finch Co.*, 404 U.S. 138 at 143 and 150 (1971). Obviously, it is still good law. Just as obviously, the Nash-Finch majority's reading of the *Menihan* rationale is more helpful to the argument we are asserting here than the dissent's more limited view.

(7) The standing of the attorneys involved in the legal community in which they practice and the prevailing rates of compensation.⁴⁶

CONCLUSION

For the reasons set forth in this Memorandum, plaintiff respectfully requests the Court to award the expenses listed in the Affidavits of Robert D. Stitser and Robert S. Pelcyger, together with reasonable attorneys' fees.

Respectfully submitted,

ROBERT D. STITSER,

Reno, Nev.

ROBERT S. PELCYGER,

DAVID H. GETCHES,

REID P. CHAMBERS,

Native American Rights Fund,

Boulder, Colo.

L. GRAEME BELL III,

Native American Rights Fund,

Washington, D.C.

Attorneys for Plaintiff.

Dated: June 1, 1973.

Senator TUNNEY. Thank you very much.

Our next witness is Dennis Flannery, who is a private attorney in Washington, D.C.

STATEMENT OF DENNIS FLANNERY, ESQ., ATTORNEY, WASHINGTON, D.C.

Mr. FLANNERY. Mr. Chairman, I thank you very much for inviting me here today.

Senator TUNNEY. Nice to see you again.

Mr. FLANNERY. I would like in my comments to stay away from the conceptional aspect of the problem that I think Mr. Kline has covered so well and get as much as I possibly can into the practical pragmatic problems.

My statement was, of course, submitted in advance and I understand that it will be inserted in the record.

Senator TUNNEY. Yes.

Mr. FLANNERY. I will try to summarize it briefly.

⁴⁶ See, e.g., *Angoff v. Goldfine*, 270 F.2d 185, 188-189 (1st Cir. 1959); *Pergament v. Kaiser-Frazer Corp.*, 224 F.2d 80, 83 (6th Cir. 1955); *Paolillo v. American Export Isbrandtsen Lines, Inc.*, 305 F.Supp. 250 (S.D.N.Y. 1969); *Highway Truck Drivers v. Cohen*, 220 F.Supp. 735, 736 (E.D. Pa. 1963); *Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference*, 166 F.Supp. 163 (E.D. Pa. 1958), affirmed 273 F.2d 218 (3d Cir. 1959), *rev'd on other grounds* 365 U.S. 127 (1961); *Rogers v. Hill*, 34 F.Supp. 358, 363 (S.D.N.Y. 1940); *In re Osofsky*, 50 F.2d 925, 927 (S.D.N.Y. 1931).

See also *Bakery and Confectionery Workers v. Ratner*, 118 U.S.App.D.C. 269, 335 F.2d 691 (1964) (*on remand sub nom.*, *Moschetta v. Cross*, 241 F.Supp. 347 (D.D.C. 1964)) (quantum meruit standard applied to allow attorneys' fees award of \$129,073.13 in a class action judged to have protected over \$1 million in union members' dues from dishonest management); *Blankenship v. Boyle*, 337 F.Supp. 296, 302-303 (D.D.C. 1972) (the court awarded attorneys' fees of \$45 per hour plus an incremental \$165,000 because of the complexity of the case (\$825,000)); *Rosenfeld v. Southern Pac. Co.*, BNA 4 PEP 72 (C.D. Cal., Dec. 2, 1971) (the court awarded attorneys' fees of \$75 per hour (\$30,000)).

The perspective that I bring to the Subcommittee, and I hope it will be of some use, is that of a practitioner who has had the opportunity of litigating big cases both as a lawyer in a private law firm on behalf of corporations and also of litigating the biggest environmental case that has been litigated thus far (*the Alaska Pipeline case*), as a member of a public interest law firm on behalf of environmental groups.

The difference between litigating a big case as a private practitioner and litigating a big case as a public interest lawyer is so great that it is almost beyond the imagination. Anyone who has not been involved in an actual litigation of a big case, I think, may have some difficulty really understanding what the tremendous strain and drains are on the lawyers involved.

The *Alaska Pipeline* case was 2 years in preparation prior to the actual court hearing. Those were full days, many times 14, 15, 16 hour days, 6 or 7 days a week. It required the combing of thousands and tens of thousands of documents, of numerous pretrial discovery motions, of numerous court appearances, preparation of witnesses, and preparation of oral arguments. In other words, the full range of problems that a lawyer faces in such litigation.

When a big case such as this comes to a private law firm, the way in which the law firm can organize is the way really that the courts are designed to handle these cases. Lawyers or teams of lawyers are formed to analyze the problem, expert witnesses are contacted, fee arrangements are made so that the expert witness can give his full attention to the case during the time he is needed, research is undertaken in a variety of areas (even areas that are tangential to the lawsuit, just to make sure you have covered every aspect), a full nonlegal administrative staff is mobilized for typing, for filing, for the whole range of problems that are taken up.

Now, when a public interest law firm is involved, or when a group of citizens or even an individual citizen decides to take on a big case and to present the views of the other side in a big case, the contrast is really marked. In the first instance, because the citizen group or individual is unable to pay even a minimal percentage of what these fees are, he is not going to be able to go to a major law firm and ask for assistance. I think after my introductory remarks we can talk about that a little more. But, in practical terms that kind of legal representation is foreclosed. Also foreclosed, sadly enough, are the numbers (and while they are growing, they are still a lonely few) of public interest lawyers who are attempting to make it on their own without foundation funding. It is a very admirable thing that they are doing, and a couple of the leading such lawyers are here in Washington. They are experienced and skilled lawyers, but they simply cannot afford to spend a year or 2 years of their time litigating a big case for essentially no fee.

So the end result is that citizen interest groups are limited to the foundation funded public interest law firm.

Now, in the first place, of course, there are not that many foundation funded law firms around. I think Mr. Kline very adequately summarized what the state of affairs is. Most of these firms are cen-

tered here in Washington, and, secondly, the foundations to some extent feel they have done their part—they have seeded the field, they have gotten some installations going, and it is not their intention to fund these groups indefinitely.

But even putting that aside, I think that one very practical weakness with public interest law firms is that for the most part they are manned by very good and very competent but young lawyers who are making a major contribution to society but who really are not skilled and experienced litigators. Many of these lawyers have not been through the process. As a result, many public interest law firms feel, and I think correctly so, that their main contribution may very well not involve taking on a big case, where they may be somewhat over their head, but, rather, in taking on more manageable cases which they can handle very well and in so doing, further the public interest.

So one result is that even in the foundation funded public interest law firms you might find that very much worthwhile and necessary suits are not being brought simply because you can't get people to do them.

But putting that aside, even if the public interest law firm takes on the suit, the way it goes around litigating it is very very different from what I know the other side will be doing.

First of all, there is simply no money up front. Whereas the public interest lawyers will have their salary paid, their salary will be a very small percentage of what the private lawyers on the other side will be making. And, even though some salary is being paid, there is very little money for such essential things as, for example, expert witnesses. And so what I found, for example, in my work on the *Alaska Pipeline* case, was that I did not have any money at all to pay any expert anything. And so basically what we had to do was to write or telephone around the country with our hat in our hands asking, university people to give us assistance and to take some time off from their heavy class workload and give us whatever assistance they could. The response was gratifying. We had 60 or so contributing experts who were very good and useful and gave us written comments that were quite helpful. But at no time could we actually say to an expert, for example, give us three weeks, we want you down here in Washington, we want to go over this technical material with you, we want you to be prepared to be a witness at trial, if we go to trial, and we realize this takes a lot of time and we will pay you a fee. This was precisely what the other side was doing. But, we could not do that.

A second result of not being able to do that was that if we had ever had a full blown trial in the *Alaska Pipeline* case some of our best experts might have had some difficulty qualifying technically to give testimony. Several of them had never appeared in a court proceeding before, never appeared before an administrative agency before. Whereas, the other side had ready access to well-paid technical experts who could have been brought in and thoroughly prepared and been ready to go.

One result of what happens is that when a public interest lawyer litigates a big case, for self protection and to make sure that he has at least part of the case he can put on with confidence, he must scale down the issues. He looks at the enormous case and sees what little segment of the case can be litigated effectively, within the funds available.

As a result, the public interest lawyer must pare off very important issues—that might even be winning issues—simply because they are either too technical or too big, or require too much expenditure of money.

So even where the environmental groups or other public interest groups actually go to court and perhaps even do well in big case litigation, the issues which they actually litigate may well be only the tip of the iceberg, but all that the group can handle because of financial constraints.

I am not at this time in a position to give specific proposals as to what I would suggest the Subcommittee do, but I would certainly be delighted to continue working with the staff to the extent that I can. The most important goal that the Subcommittee should keep in mind is the thought that if we are going to operate in an adversary system, that system should be able to function as an adversary system, and if a case is being litigated supposedly between two adversaries presenting the best picture they can for their side before a neutral judge who is then supposed to choose between the sides from the clash of opposing views, I think the Subcommittee should be very concerned that that is not simply a mock ritual but that there is a real clash of views roughly equal in preparation, roughly equal in skill. Of course, there will never be perfection. But I think this is the goal and a fundamental goal for a constitutional system and for having public interest groups to continue to work within the system. Incidentally, if there are any public interest groups that have consistently worked within the system and have attempted to develop their views within the system it is the environmental groups. I think they have been extremely responsible through the years.

Legislation to the extent that it might come forward or at least be recommended by this Subcommittee should be aimed at not only making fees and court costs available to public interest representatives, at the end of a winning litigation. That is not enough. There has to be some mechanism where fees, in some cases substantial fees for both attorneys and witnesses, are available as the case is being developed and as the case is being litigated, so that while the litigation is going on the attorneys are not always scaling down and scaling down and throwing away issues simply because they think they are not going to have the money to develop them.

Now, to have something like this, and I have given some more specific ideas in my prepared statement, than I will go through here, would require some amount of controls. There would have to be controls to make sure that suits are not frivolous, that suits are meritorious, as the suit is going on, that the lawyers are not being carried away, that they are continuing to act responsibly. I believe mechanisms like that could be established and could be established as to not interfere with the lawyer's representation of his clients and not to unduly intrude upon the litigation process.

In many cases we hear rhetoric about how important our citizen groups are and how our judicial system is the system within which disputes are finally settled. But the rhetoric is really empty when you get up against the cold fact that the resources available to opposing sides in many cases are so disparate. We have, to some extent, a system that does not function the way it should. One final point. I think that many sensitive judges and many sensitive courts realize this, and in at least some cases judges compensate for the fact that you have essentially a kid arguing against a man and the judge takes this into account in the course of argument and trial and in his opinion. But even that is not the way the system is supposed to work. It is an undue strain on a judge to actually expect him to do that. I think the system works best when it works the way it is designed. We should have a full adversary system that functions as such.

Senator TUNNEY. Mr. Flannery, I agree that there is a need to find some mechanism, like fee-shifting, to provide funding for public interest lawyers and perhaps even to make funds available prior to the conclusion of the successful case by a plaintiff.

On the other hand, you are dealing with a number of policy goals and issues here. I suppose it could be fairly said that one basic policy goal of our government is that Federal tax dollars are not to be used to benefit one group of citizens over another group of citizens.

Now, I think that applies whether on the one hand a plaintiff is a group of concerned citizens without money, or corporations which have a great deal of money.

On the other hand, we want to make sure that the public interest is protected when you have a group of individuals or corporations who are planning to do certain things which are going to represent a degradation of the environment or in some way infringe upon the public's interest.

The question is: How do you develop a mechanism where you can meet both policy objectives? For instance, in your *Alaskan Pipeline* case, I can imagine the outcries that would have arisen in the Congress, and in the country, if Federal tax dollars were used to support the plaintiffs in that case. I suppose that in your particular lawsuit there was another policy objective involved, that is, energy. It is in short supply in the country and we have a desperate need to open up the oil fields and to bring the oil to market in the most convenient, and cheapest way.

I know that it is a difficult question for you to answer, and I know you have addressed the problem, but I must say that just to state the problem certainly does not in any way give us the ability to solve it without a greater degree of specificity on your part or on the part of others who are knowledgeable in this area.

Mr. FLANNERY. The first place to start, I would think, is that when we are talking about corporate litigation, and corporations litigating cases, public tax dollars are in a very real sense being used to support that litigation. The corporation's litigation expenses, its attorneys fees, its court costs and all costs connected with the litigation are deductible from the corporation's income tax. And that is win or lose, frivolous or nonfrivolous, meritorious or nonmeritorious. So you really have a built-in beginning that one side that is litigating the

kind of issues I am talking about is already being supported by public funds.

I really don't want to focus on the *Alaska Pipeline* case. As I indicated in my prepared statement, the attorney fee question, which is a different question from the one I am addressing here (a question going to the equitable powers of the courts), is now under advisement in the Court of Appeals. I am certainly not addressing myself to whether or not under that equitable powers theory attorneys' fees are appropriate. But using the *Alaska Pipeline* case in a very general sense, since you do allude to it in your question to me, the kinds of interests you have identified, the energy interest and the economic interest, are very real ones. I emphasize that they are very real and very important issues, and I don't by any means seem to want to indicate that they are not. But one reason I think why they seem so real and so important is that they have such effective advocates expressing them. I think someone compared the efforts of the oil industry and of the environmental groups in Congress as a well-heeled effort on the one hand and a rag-tag bunch on the other. I think that is a fair comparison to some extent. I think the litigation to some extent was the same way. You had extremely effective and fair and very good advocates on the other side. Nothing I am saying here is a criticism of people who represent corporations, obviously since I represent corporations now myself. Nor am I criticizing the advocates of the *Alaska Pipeline*. They had a very real case to present and they had so outstripped the resources that the environmentalists had, that anyone who really did not take an awfully hard look and get into the issues to think them out for himself would unintentionally tend to put to the side the environmental concerns that were expressed. So I really think the comment you make is an outgrowth of the problem we are talking about.

What your Subcommittee is endeavoring to do, and I think it is a wonderful effort and an extremely important effort, is to grapple with that situation so that in very complex cases like this where you have economic interests on the one side, which are easy to understand in dollar and cents terms, and which are easy to get outstanding legal representation for, because dollars and cents are available to retain that representation, that those economic interests will not so overwhelm these other equally important interests, and in some cases more important interests, that these other interests fall to the side. The National Environmental Policy Act was passed with that very thought in mind. I suppose the main goal of NEPA was to raise environmental values somewhat to the level of economic values so that the decision-makers, either the executive Congress, or the courts, could grapple with them. So NEPA really was passed in recognition that there is this built-in inequity and NEPA goes part of the way by setting up the goals that noneconomic interests have to be given representation, have to be expressed somehow so there is a basis for making a decision. But leaving it there, and not then taking the next step and making sure that those who are trying to make sure that those who are trying to make sure that NEPA's goals are affectuated and that environmental values do get their place, to not make sure

that this process in fact works is making NEPA a hollow statute. I am not saying environmental issues are more important than economic issues nor am I saying that the corporations, for example, in the *Alaska Pipeline* case had no concern for the environment. Obviously they did, and they have done many things to protect the environment, but from their perspective of what the problem was. All I am really saying is that for someone like Secretary Morton, or for the Congress and the courts, in the *Alaska Pipeline* case or in any other case to make a decision as to which way to go, you need a full presentation on both sides.

Senator TUNNEY. Yes; I agree with that. You have indicated that the tens of thousands of hours can be spent in one of these complicated environmental cases. Would you consider the amount of work roughly comparable to a complex antitrust or patent action?

Mr. FLANNERY. Yes; I think the environmental cases are clearly that way. As you get more and more into an objective evaluation of the issues, the sort of cost benefit analysis which the courts would really like to see develop because they too are seeking an objective way to look at the problem, it gets much more technical, much more scientific. Again, using the *Alaskan Pipeline* case for illustrative purposes, that project, as you know, and you certainly are familiar with it very thoroughly, involved almost every scientific expertise imaginable, from seismology to terrestrial biology to marine biology, oceanography, oil field technology, and on and on. The areas were amazingly complex and amazingly technical. To get a full grasp of the problem and to determine whether in fact the issues had been aired sufficiently in the administrative process, we required a substantial amount of self-education in talking with experts who were willing to talk for free, in sending material to experts, getting comments back from experts. It was an enormous undertaking, I certainly would compare it very definitely with the most complex antitrust case I can imagine.

Senator TUNNEY. You work for a large corporate law firm in Washington. Is it not true that in complex antitrust cases attorneys fees can run up into the millions of dollars?

Mr. FLANNERY. Yes.

Senator TUNNEY. In order to justify taking an environmental case with its complexity over an antitrust case, would a large corporate firm require the same kind of fee?

Mr. FLANNERY. I think that many law firms feel not only a responsibility but a desire to engage in public interest work as well as their regular work. Now that all has to be read in the context of whatever conflicts they have. They are certainly not going to represent an oil company one day and sue the oil company the next day. There are ethical restraints on that. But I think there are enough areas in which each law firm does not have a conflict and in which it could and would like to engage in public interest work. In addition, many law firms do feel that when they get into public interest cases they need not necessarily be compensated at the same rates as their other work. But the same constraints that limit the public interest law firms from taking on too many big cases, which would tie up substantial

resources for a couple of years, also limit the big private law firm. That firm would be delighted to take on cases that a couple of men could handle over the course of a year or two and integrate into their paying work. But when you are talking about the big case, it means charting out two, three, or more people who will work on that case and basically no other case for a year or year and a half. I think that even here, if there were a floor, and certainly not the \$30 an hour floor that Mr. Kline indicated public interest lawyers are unable to live off either, if there were a reasonable floor that the law firm could be sure would be coming back, I think you would find law firms willing to make up part of this difference as a public contribution.

Senator TUNNEY. On page 7 of your testimony you expressed regrets that public interest lawyer needs to wait all through the appellate process before he or she can get his attorney fee. What would happen if he got his fee at the district court level and on appeal there was a reversal. Would he or she have to give his fee back?

Mr. FLANNERY. I guess the case that comes to mind is that *Howard Hughes* case, a big victory, not a public interest case, a big victory in the district court, for, I think, over a million dollars award of fees. The Supreme Court did reverse it. I don't know what happened to the affected lawyers, but I think that they did have some problems. There is a point in my statement, that I would like to reiterate here. I don't think the standard should be win or lose. In other words, if you win the case somehow you get fees, but if you litigate a case and after 3 years you lose, you get no fees. It is just much more complex than that. In most environmental cases with which I am familiar, where the environmentalists have ultimately lost they have nonetheless made a substantial contribution. Again let's put the Alaska pipeline case aside, I don't want to focus on that, but take the Storm King case in New York, that big FPC project that was probably the biggest environmental case before the Alaska pipeline, to be litigated. Or take the recent Texas case, *Sierra Club v. Lynn*, 5, ERC 1745 (W.D. Tex, 1973), that Mr. Kline referred to, and several others where the ultimate result has been that the project has ultimately gone forward, yet the filing of the suit, the conduct of the litigation, the light that was brought on the project by the litigation, in the end, very clearly served a public interest and made the project a safer project, a better project. Perhaps the environmentalists who brought the suit still may feel that the project should not go forward. Nonetheless, when the project goes ahead it is a better project for having gone through the lawsuit. So I don't think that the goal should be that public interest lawyers or law firms or whatever who litigate environmental or other public interest suits will get fees if they win and if they lose they won't, and I think it is much more complex than that.

Senator TUNNEY. You have suggested that the corporations in these environmental cases in which the corporation is a defendant, are able to write off their litigation expenses against their taxes, in other words, the taxpayers of the country are indirectly subsidizing the corporate interest. What about the possibility that a person, pre-

pared to make a contribution to a defense fund in which the environmental action was brought, could write that contribution off against his taxes rather than getting direct Federal funding?

Mr. FLANNERY. Certainly that is something to think about and to explore and I think it is a possibility. I think the other side of the coin is, again, that when you have economic interests at stake, in other words, for example, if the question was a dispute in which either corporate stockholders or other individuals stood to lose their investment or \$3,000 if it went the wrong way, it might be relatively easy to get from a whole group of individuals facing that sort of risk a contribution of \$100 to protect their \$3,000. When you are talking about noneconomic interests, when you are talking about environmental interests or other interests that cannot be quantified, even though people are very concerned and may be interested in it, I think it more difficult to convince them to fork over \$100. This is like public broadcasting or other areas where similar fund raising problems have been experienced. I don't think it is being elitist to say in some of these cases the public at large is not really aware of what the problem is until it reaches absolute crisis proportions. And so you have, in some of these cases, people who are going beyond what the public at large is prepared to accept and yet in a very real sense, I think, the public at large is being served even though if you had a plebiscite or vote, perhaps the vote would go the other way.

Senator TUNNEY. Well, Mr. Flannery, you present an extremely interesting and very subtle complex problem to the Subcommittee and I wish that it were possible to say that there was an easy solution to it, through legislative means. I think the very fact that you have not recommended a legislative proposal after all of the many hours that you spent thinking about the problem is indicative of how very complex the problem is.

I for one have always felt, since I have been in public service, a natural inclination to be supportive of the environmental position. When you have on the one hand the interests of preserving the environment in this country contrasted against an unplanned or perhaps poorly planned development of the natural resources, on the other hand, I find it difficult to work out a formula myself which would make it possible to use the Federal taxpayers dollars to sustain an environmental lawsuit. There are, of course, such obvious mechanisms as allowing foundations to exist and use their money for the purposes of supporting these suits or perhaps in some instances providing salaries to the attorneys who are going to bring the lawsuits, as in the case of legal services for the poor. There are instances where those legal service lawyers will bring environmental suits to protect the interests of the poor. But when you step away from those obvious instances, where it is relatively easy to formulate a mechanism to allow Federal tax dollars to support these environmental lawsuits, it becomes much more difficult. I think this has been a most articulate presentation. The problems of having enough money to be able to pay expert lawyers and being able to really have an adversary proceeding rather than a Goliath against David with the Goliath having the slingshot, are evident from your testimony. I just don't know how we are going to be able to formulate a legislative recommendation

that does not in some way rely on incentives to private individuals to make contributions for the purposes of sustaining that lawsuit. I think it would be very difficult to pass a law which says that in an environmental lawsuit X numbers of thousands of dollars will be paid to plaintiffs' lawyers for the purposes of discovery, and for the purpose of paying expert witnesses and attorney fees.

Mr. FLANNERY. The problems are obviously real ones. You are taking as pragmatic a view of possible solutions as I have attempted to take in articulating what the problem itself is. I think that if the goals are kept in mind, the goals of making the adversary system a real system and not simply a paper system and the very real need for having experienced people litigating cases that require experienced people to litigate them, I think that once those issues are aired and are under the consideration of the Subcommittee with the thought that you and your excellent staff will obviously be giving them a mechanism will be found that might satisfy most if not all of the conflicting interests on this matter.

Senator TUNNEY. Well, I hope that you are right. I certainly don't want to sound totally pessimistic but I have had 9 years of experience in Congress and I think that at best it is going to be very difficult to achieve such a legislative formulation.

Mr. FLANNERY. I agree, but I think great efforts begin at the beginning and this is the beginning of a great effort. I am delighted that you are taking such a personal role in it and I have an optimism that the end result will be satisfactory.

Senator TUNNEY. Thank you very much, Mr. Flannery, we appreciate not only your testimony but the opportunity that my staff had to speak to you and flush out some of the points that you have made here today. I think it is something that we really have to address ourselves to.

Mr. FLANNERY. Thank you.

Senator TUNNEY. Thank you.

[The testimony resumes at page 843. The prepared statement of Mr. Flannery follows:]

PREPARED STATEMENT OF DENNIS M. FLANNERY, ATTORNEY AT LAW,
WASHINGTON, D.C.

Mr. Chairman, I appreciate your invitation to appear here today. The questions that the Subcommittee is addressing are, in my judgment, basic to the effective functioning of the decision-making processes of our Government. For those processes cannot serve the public interest if they are exposed to only one side of controversial public issues. I am, therefore, honored at being given this opportunity to participate even in this small way in the Subcommittee's deliberations.

At the outset, I want to make clear that: (1) I am speaking only for myself and not on behalf of any other individual or group. (2) I am counsel of record in two environmental cases in which requests for attorneys' fees are now under advisement.¹ None of the comments I will be making here today are addressed, nor should they be construed to be addressed, to the question whether attorneys' fees should be awarded in either of those cases. The thrust of my comments is, in short, entirely prospective.

In his environmental message to Congress in August 1971, President Nixon stated:

¹ *Wilderness Society v. Morton*, Nos. 72-1796-1798 (D.C. Cir.) (Alaska Pipeline case), *Sierra Club v. Fri*, C.A. No. 1031-72 (D.D.C.).

"In the final analysis, the foundation on which environmental progress rests in our society is a responsible and informed citizenry. My confidence that our Nation will meet its environmental problems in the years ahead is based in large measure on my faith in the continued vigilance of American public opinion and in the continued vitality of citizen efforts to protect and improve the environment."

But, these citizen efforts cannot serve their legitimate and admittedly desirable purpose, if resources are not available for their effective prosecution. This is particularly true when issues of public importance are being litigated in the judicial forum, whose very structure rests on the presentation by adversaries of opposing positions. Obviously, a just and correct result—which is precisely what the adversary system is designed to produce—is least likely when there is a marked difference in the quality of legal representation available to the respective adversaries or in the financial resources that the respective adversaries can devote to the presentation of their side of the case.

For the last two years I was a public interest lawyer, representing the environmental organizations in the massive Alaska Pipeline litigation. Before that I was in private practice for several years, and I am back in private practice now. I approach the question of citizen interest representation, therefore, from the perspective of one who has had the opportunity to litigate big, factually complex cases both as a private practitioner and as a public interest lawyer. And, I must say that the difference is a striking one.

Having represented both corporations and public interest groups, I believe it is fair to conclude that as things now stand, the more complex the public issue, the more likely it is that the decision-maker—be it an administrative agency or a court—will be presented with an increasingly one-sided approach to the problem. Nowhere is this danger more acute than in the area of environmental law, when environmental interests conflict with large economic stakes.

It is difficult to describe, to anyone who has not himself been involved in the process, the extraordinary demands of big case litigation. Months must be spent by the lawyers involved familiarizing themselves with the technical and scientific data germane to the case; in collecting, analyzing, and digesting thousands upon thousands of relevant or potentially relevant documents; in locating and preparing expert and other witnesses; and in participating in the full range of pre-trial discovery and other tactical devices. The culmination of this preparation is, of course, the court hearing, which can last for days or weeks and for which extensive briefs must be written, witnesses prepared, and arguments honed. Finally, win or lose, the likely result of the initial court hearing is the filing of appeal briefs and the presentation of appellate arguments. In short, we are talking about thousands and tens of thousands of manhours of legal work.

When a proposed commercial project pits environmental concerns against the strong economic interests of corporations (or entire industries), the battle is one between David and Goliath. In this battle, however, Goliath holds the slingshot as well as the weight advantage. The concerned corporation will retain and pay full value for the services of one or more of our country's numerous prestigious law firms. Teams of skilled and experienced lawyers, together with competent and well-paid expert witnesses, researchers, and clerical help will be assigned the task of presenting the corporation's case in the best possible light. (Indeed, in most cases it can be expected that this array of legal and supporting talent will have been brought together at the earliest planning stages, before the corporation has even approached the administrative agency with responsibility in the area.)

It is important, I believe, to emphasize here, that neither corporations nor the law firms that represent their interests need be the least bit defensive about leaving no stone unturned in putting forward their best possible case. Indeed, the adversary system, not to mention the canons of legal ethics, demands no less. The problem is that under present circumstances the corporation's citizen interest adversaries cannot devote anything approaching a comparable expenditure of resources to the development of their side of the case.

Concerned citizen interest groups will ordinarily be unable to raise even a small portion of the anticipated legal costs and fees for a major litigating effort. As a result, they are foreclosed *at the threshold* from retaining the type of legal representation that might best assure the effective presentation of

their case within the adversary system—i.e., an established law firm with skill and experience comparable to that of the firm representing their corporate opponent.²

The only realistic source of legal representation for citizen groups contemplating major litigation is the foundation-funded public interest law firm.³ The most obvious problems with this state of affairs are (1) there are not enough such organizations to go around, so that numerous meritorious cases may go wanting simply because there is no one to bring them; and (2) we cannot depend upon foundations to support these public interest law firms indefinitely.

But the problems really go much deeper. In their present state of development and with the funds currently available to them, the public interest law firms often do not have on their staffs senior lawyers with the experience necessary for effective big case litigation. The result is that foundation-funded public interest law firms may also shy away from the big case, choosing instead to concentrate their efforts on smaller, more manageable endeavors.

To the extent a foundation-funded public interest firm takes on the big case—and regardless of whether the lawyer involved is an experience or neophyte litigator—it will find itself constrained by practical, every day limitations that substantially tilt the balance against it, regardless of the objective merits of the case. To cite but a few examples, resources will be lacking to locate, retain, and prepare expert witnesses; to undertake necessary legal and technical research; and generally to keep pace with the full range of issues that will be explored and developed by the other side. The prospect of court awarded fees and costs at the conclusion of the litigation, if successful, does not ameliorate these problems. There is a cash requirement for funds at the outset to pay these necessary expenses.

I believe, therefore, that one of the most significant contributions that this Subcommittee could make would be the consideration and development of innovative legislation that would make available—from public sources, private sources, or a combination of both—funds to pay reasonable attorney and expert witness fees, and other court-related costs, of meritorious citizen interest litigation. To serve their purpose, these funds cannot be withheld until the conclusion of the litigation (as, for example, the Clean Air Act now provides, 42 U.S.C. § 1857h-2(d)). Nor should such funds be limited necessarily to those groups whose court litigation results in a formal “victory.” Numerous courts have recognized that citizen litigation frequently contributes to safer and more carefully thought-out projects, even though the suit does not succeed in stopping the project entirely. See *e.g.*, *Sierra Club v. Lynn*, Civ. Act. No. SA 72 CA 77, W.D. Tex. (Spears, J.), June 28, 1973.

While I am not now making any specific proposals, one possible approach that the Subcommittee might explore is to make available interest free “loans,” or to guarantee interest free loans from private sources such as foundations, for reasonable legal fees, witness fees, and other litigation-related costs of citizen interest litigation. In its broadest contours such a plan might involve the following. Screening criteria might determine initial and continuing eligibility for such funds in light of the public importance of the matter to be litigated, the disparity between the resources available to the protagonists, and the particular requirements for funds. The funds themselves would be available on a periodic basis (i.e., quarterly) during the life of the litigation. At the conclusion of the litigation, the courts could determine—much as they do now—whether the case is an appropriate one for taxing the fees and other costs to any of the other parties. To the extent such costs are taxed, the moneys previously advanced could be returned to the loan fund or to the private lender.

Such legislation, or other legislation serving a similar purpose, would in my judgment close, at least to some extent, the unacceptable gap that now exists between available legal representation for private and public interests.

² Whatever their philosophy toward citizen interest litigation, such private law firms can rarely be expected to volunteer the major, non-compensated effort that such representation would entail.

³ The admirable public interest lawyers—such as the law firm of Berlin, Rolsman & Kessler and the sole practitioner Bruce J. Terris here in Washington—, who are attempting to develop public interest practices independent of foundation funding, can afford even less than the established private law firms to devote a major portion of their time to non-remunerative enterprises. If they are to survive, they must concentrate their efforts on fee-generating public interest cases.

It would also encourage both private law firms and non-foundation sponsored public interest lawyers to lend their badly needed experience to the other side of big case environmental litigation. Finally, the use of public funds for such a purpose is hardly a radical notion. It deserves mention that litigation-related expenditures by corporations are tax-deductible. So, in a very real sense, the public is already supporting the presentation of the views of one of the protagonists.

Senator TUNNEY. Our next witness is a panel, consisting of: Clinton Bamberger, Dean, Catholic University Law School, Washington, D.C., appearing as President of National Legal Aid Defender Association; Mr. Joseph Onek, Director, Center for Law and Social Policy, Washington, D.C.; Mary Frances Derfner, and Armand Derfner of the Lawyers' Committee for Civil Rights Under Law, Washington, D.C.

I think it would be best if we heard the initial presentation from each of the witnesses and then we will go to questions, if that is satisfactory.

Why don't we start with the order in which I called the witnesses, Dean Bamberger, Joseph Onek and then the Derfners.

PANEL OF CLINTON BAMBERGER, DEAN, CATHOLIC UNIVERSITY LAW SCHOOL, WASHINGTON, D.C., APPEARING AS PRESIDENT OF NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, AND JOSEPH ONEK, ESQ., DIRECTOR, CENTER FOR LAW AND SOCIAL POLICY, WASHINGTON, D.C., AND MARY FRANCES DERFNER AND ARMAND DERFNER, ESQ., LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, WASHINGTON, D.C.

Mr. BAMBERGER. Mr. Chairman, I am Clinton Bamberger, I am here as president of the National Legal Aid and Defender Association, I apologize for the fact that you don't have 50 copies of my statement but let me put that forth as the first proof of the need for the inquiry here. The National Legal Aid and Defender Association treasury is literally exhausted from its effort over the past 3 years to keep the legal aid movement and the defender movement alive in this country. We don't Xerox anything more than once. I apologize for that.

I would like to say at the outset that I think you have put to us a most important opportunity. I think what you are talking about is presenting to the public and to the Congress and to the bar an opportunity for peaceful resolution of disputes, for a system of accountability of public and private institutions. Later on I want to emphasize what I think you are doing in terms of enhancing the ways in which we can protect rights and enforce responsibilities.

Let me talk first to the particular concern of the National Legal Aid and Defender Association, and that is, legal counsel and advocacy for the very poorest in society.

First, on the civil side.

Until 1965, the only support for civil legal assistance for very poor people in this country came through voluntary efforts of the bar and voluntary contributions through organizations such as the Community Chest. In 1965, we spent about \$5 million to provide civil legal assistance in the entire Nation and \$1 million of that was spent in New York City alone.

Things have changed since 1965 when the Congress enacted or prior to that, 1964, the Congress enacted the Economic Opportunity Act. In 1965, the legal services program of the Office of Economic Opportunity came into existence. I had the great opportunity to be the Director of that program when it began.

But as Mr. Kline said here earlier, we are still only meeting at the best, at the minimum I guess, about 28 percent of the needs in the civil area. We now spend about \$71.5 million on civil legal assistance for the poor. That provides assistance for about a million and a half cases a year. The attorneys are carrying a caseload of about 300 cases. That amount has not changed since 1971. There has been no increase in the dollars spent for civil legal assistance. The amount of services that it can purchase is considerably diminished under the force of inflation, under the force of the restrictions by HEW on the kinds of services which can be rendered in its program, and under a number of other policies of the Government.

For instance, legal services programs can no longer purchase equipment and supplies through GSA, consequently they have about another \$2 million that they must spend on nonservice functions each year. If the program would render in 1973 the amount of services that it rendered in 1971, our best estimate is that it would need another \$15 million.

Let me speak a minute about criminal representation for the indigent.

As you know, the Supreme Court in the *Gideon* case in 1963 and in the *Argersinger*¹ case in 1972, mandated that no one will go to jail unless he was represented by counsel. But we have been very slow in implementing even the 11-year-old decision of *Gideon*, and we have hardly begun to address ourselves to the problem of *Argersinger*. Our criminal court dockets remain crowded, there is no effort to provide representation in lesser crimes at any stage prior to trial. The best estimate is that 60 percent of the criminal defendants cannot afford counsel. *Argersinger* now requires counsel if there is to be a jail sentence for something between 5 and 8 million misdemeanor defendants a year. There is some movement and I hope that your efforts will encourage that.

The Law Enforcement Administration Agency is now agreeing to increase funding for defender organizations. Until now it had not spent its appropriations to provide counsel for poor people in any significant way, even in any hardly known way. We are encouraged that it does now recognize that responsibility.

The amendment that the Congress passed in 1973 to the Omnibus Crime Control and Safe Streets Act recognized that defender services are part of the criminal justice system but the Congress still needs to recognize that the States cannot meet the obligation to provide counsel for indigent accused persons in the criminal process without massive infusions of Federal funds. It is a Federal obligation, if one recognizes that an obligation that springs from the Federal Constitution is a Federal obligation. The Congress must do more to meet this obligation and to assist the States to meet that obligation.

¹ Set forth at page 713.

The National Legal Aid and Defender Association is fully supportive of the efforts of your inquiry and particularly of court awards of attorneys' fees in civil cases. I suggest also that we might consider what happens to a wrongly accused and innocent defendant in a criminal case. We now pauperize an innocent person to sustain the presumption of innocence. I mean no disrespect but it is significant that the second highest elected official of this country must seek public support to defend himself, if he is indicated in a criminal case. What about the man of lesser wealth and affluence who is accused of crime and presumed innocent? Is it right to pauperize him, if that is a word, to sustain that presumption?

I want to particularly encourage you to be certain that whatever legislation comes out of this inquiry treats the lawyers in legal aid programs as lawyers at the private bar are treated. It is interesting to note that the OEO regulations permit attorneys in legal services programs to collect court awarded fees. They establish a method of accounting for that. That could be a considerable source of the additional funds that are needed to provide legal services for the poor.

Let me depart from the particular a little bit and say some things which I think are kind of basic.

You know, to some extent you are challenging history. The legal historians tell us that all through the history of English law and American law, until rather recently, we have discouraged litigation. Remember that we have common law crimes of champerty, barratry and maintenance which are aimed at prohibiting any encouragement of litigation in the adversary process. The historians say that that is because it arose sometime in the 13th century in England when the courts were rather corrupted by the property class in England. There was an assumption if one encouraged litigation and solicited litigation one did that because one knew one had the judge in his pocket. Well the evil to be cured was the corruption and not the litigation.

Secondly, courts then generally dealt with property rights, rights in which there was a principal interest of the two litigants, but not a considerable public interest. The adversary proceedings was then and perhaps even now is the least peaceful of the ways of resolving controversy, at least contrasted with negotiation and settlement that is a more peaceful process. Courts are often a winner take all and loser takes nothing result which leaves one person rather unhappy. The adversary proceeding is a fractious and belligerent process and so society was interested in encouraging the more peaceful ways of resolution and leaving courts as the last resort. So we made it a crime to encourage litigation, to solicit litigation, and for a nonparty to support the litigation or the litigant, the crimes of barratry and maintainance and champerty.

But remember the American bar changed that when the American bar recognized that people who had suffered injury to their person or to their property ought to be able to take their grievances to court even if they could not afford a lawyer. We established the contingent fee system which violates the common law prohibition against champerty, and we did that to afford access to a court for people with grievances. That is in essence the way in which the plaintiff's cost of counsel are taxed against the defendant.

I think there are empirical studies to provide that when a jury assesses damages in a personal injury case they take into account their knowledge that the fee will be paid out of the award. They compensate the plaintiff for his injury and make a guess about what percentage the attorney is going to take and tack that on. So it is in effect a taxing of the costs if counsel against the defendant.

Courts don't deal so much now with property disputes. They deal with property disputes but they deal now with many more things, things in which there is a higher public interest, rights, individuals' rights, rights that the society has decided ought to be preserved and enforced in order to have a peaceful, tranquil and beneficial society.

You can't negotiate rights. It is very difficult for me to compromise on racial segregation. An institution is either a racist institution or nonracist institution. It is hard to have a half-segregated school.

It is very difficult to compromise issues about the environment.

If compromise is not the way in which these disputes can be resolved, then the courts are the effective instrument.

The public has a great deal more interest in these issues now.

If you and I have a dispute about where the line lies between our property, we can compromise that, 2 feet on yours and 1 foot on mine, and we will be relatively happy. The result is not going to affect anybody else; but when we are dealing with the kind of issues we are talking about here, rights, public issues, issues which transcend the grievance of a particular litigant, then there is a much larger public interest and we ought to make the courts more accessible for the resolution of those kinds of controversies.

What I try to say there is I think you have to recognize that you are challenging some sort of basic notions that exist at the bar and in the courts and the whole legal profession that suggest that we don't really want to provide full access to the court system, and I think the reasons for that theory died somewhere in between the 13th century and the 20th century and I hope your idea is now one that is in its time.

Thank you.

Senator TUNNEY. Thank you.

[The testimony resumes at page 849. The prepared statement of Mr. Bamberger follows:]

PREPARED STATEMENT OF DEAN E. CLINTON BAMBERGER, PRESIDENT OF THE
NATIONAL LEGAL AID AND DEFENDER ASSOCIATION

Mr. Chairman and Members of the Subcommittee, I am Clinton Bamberger, President of the National Legal Aid Defender Association. I welcome your request to appear before you today to present the views of NLADA concerning methods of financing the delivery of legal services to otherwise unrepresented interests.

As you may know, NLADA, since it was founded in 1911, has been concerned with the delivery of legal services to those in our society who are the most unrepresented—the poor. NLADA was founded on the basic and fundamental principle that the legal needs of the poor deserve the same high quality of professional service as is available to those with means. Achieving equal justice under law requires that continuous pressure be brought to bear on our legal system.

It is not a recent discovery that minorities and the poor have been exploited and abused by our justice system. Reginald Heber Smith, one of the founders of NLADA, wrote in 1919:

"The administration of American justice is not impartial, the rich and the poor do not stand on an equality before the law, the traditional method of providing justice has operated to close the doors of the courts to the poor, and has caused a gross denial of justice in all parts of the country to millions of persons."

(R. H. Smith, *Justice and the Poor* 8 (Mem. Ed. 1967))

Growth in the movement toward legal services for the poor was steady but slow during those early days. In fact, not until Congress passed the Economic Opportunity Act of 1964, and the subsequent establishment of the Office of Legal Services, did the public begin to assume a significant portion of the responsibility to provide legal representation for persons unable to pay for private attorneys in civil cases. The Criminal Justice Act of 1964, and *Gideon v. Wainwright*, 372 U.S. 335 (1963), established the right to counsel in criminal cases. These events went a long way in promoting the concept that poor people should have attorneys available to meet their needs but the implementation of this concept has fallen far short of the goal of providing counsel to all poor persons. In our complex technological society reliance on the advice and advocacy of attorneys has increased in every strata. Use of courts has risen to such an extent that virtually every jurisdiction is suffering from crowded dockets and long delays. People who once accepted their powerlessness now see that with adequate representation they can contest the inequities of their lives; they are doing so in growing numbers.

We are now witnessing the gradual withdrawal from participation on the part of publicly-supported programs through funding cutbacks and attempted program terminations. It is ironic that the diminution of resources is occurring at a time of unprecedented demand for services. In 1972, the United States Supreme Court handed down a decision in the case of *Argersinger v. Hamlin*, holding that no person may be sentenced to prison without having been represented by counsel, thus placing a tremendous burden on public defender services. The increasing complexity of our society and a new awareness by poor persons that they need legal assistance have combined to fill waiting rooms of legal assistance programs and crowd courtrooms with those waiting their turn at justice.

FINANCING LEGAL SERVICES TO THE POOR

The actual Office of Legal Services budget has not increased for the last three fiscal years (1971, 1972, and 1973) and is not scheduled for an increase for this current fiscal year. The level of \$71.5 million has served an ever increasing case load which is now at 1.5 million cases per year for an average of more than 300 cases per attorney.

At the same time, according to the Consumer Price Index, inflation has caused a 13.4% increase in costs since Fiscal 1971 (FY 1971—4.7%; FY 1972—3.0% and FY 1973—5.7%). The inflationary spiral alone would justify an increase of almost \$10 million in operational costs of civil legal services over the past three years. Another indicator would be the level of government salaries which have increased by over 30% since 1970. A similar increase in salaries for legal services program employees would have required an additional \$20 million to keep pace.

Secondly, according to a 1972 regulation of the General Services Administration, legal services programs, as did other government programs except for cost-plus contractors, lost the authority to purchase from GSA and to use FTS telephone systems. It is estimated that this loss of purchasing power has added approximately \$2 million to operational costs.

Finally, the restrictive H.E.W. regulations published on September 11, 1973, will eliminate about half the legal services which have been provided under the H.E.W. social services program. The clients of these programs will have to be picked up with Legal Services monies if they are to be served. Since there is approximately \$6 million in this program, another \$3 million increase in legal services budgets would be required to continue this existing service.

If we add the minimum increments (Inflation—\$10 million; GSA—\$2 million; and H.E.W.—\$3 million), we arrive at a total of \$15 million needed merely to bring the Legal Services program up to a level of present operational efficiency. This would not add any new program, staff, or efforts but would allow the program to bring itself to the proper capacity to fill existing obligations.

While the right to counsel in criminal cases was decreed by *Gideon* and *Argersinger*, the Supreme Court's pronouncements defining the obligations of the states to provide counsel are being implemented very slowly. Counsel has not been provided at critical stages of the prosecution due to the lack of manpower and resources to implement the Court's mandates. Most states still lack organized defender systems and rely on random court appointment of counsel who may not enter the case until the trial level. Moreover, in many areas, defense of the poor is a matter of charitable contributions of attorney services rather than a "system."

Some of the shortcomings of our present system were pointed out by Attorney General Richard G. Kleindienst, speaking before the National Conference of State Legislative Leaders on December 8, 1972. Referring to the current crisis in the urban criminal courts, he urged,

"Let us face up to the fact that in some of our largest cities the bulk of the criminal cases are not brought to trial because if they were, the court system would collapse under the caseload; rather, defendants are encouraged to plead guilty to a lesser charge—often a misdemeanor instead of a felony—in order to get them off the docket * * *."

In his speech, the Attorney General suggested that, as part of an agenda for mutual action by the state and federal governments, we should complete the task of providing public defenders "for all Americans who may need them."

At one time, a system of noblesse oblige on the part of private attorneys may have sufficed. However, approximately 60% of all defendants facing trial in this country today cannot afford to retain private counsel. Given the annual statistics of approximately half a million felony cases and 5 to 8 million misdemeanors in this nation's courts, the volume of cases requires an organized system of well-trained defenders.

In 1968, Congress passed the Omnibus Crime Control and Safe Streets Act which established the Law Enforcement Assistance Administration (LEAA) as the federal agency within the Department of Justice to improve the American system of law enforcement and justice. In the first three years, FY 1969, FY 1970 and FY 1971) LEAA spent over \$859 million, of which only 1.6% went to defense of persons unable to otherwise employ counsel. NLADA has received assurances from the present administration of LEAA that this trend will not continue and that LEAA intends to increase funding for defender services. NLADA was pleased to note that the recent amendments to the Omnibus Crime Control and Safe Streets Act specifically recognized defender services as part of the criminal justice system. The funding of defender services can no longer be considered solely a state responsibility. Federal assistance must be provided now that the states must comply not only with their own state codes, but with the mandates of the Federal Constitution as well. Even an organized defender system, if hampered by lack of resources and excessive caseloads, cannot provide effective assistance of counsel. A massive transfusion of state and federal funds will be necessary to meet the constitutional standard that the type of justice a person gets should not depend upon the size of his pocketbook.

COURT AWARDS OF ATTORNEYS' FEES

It is against this background that I would like to turn to the issue of court awards of attorneys' fees. First let me state that I join with my colleagues representing the private bar and public interest bar in urging the necessity of the award of fees to increase and promote the ability of citizens to obtain adequate legal representation. The poor and middle-income people should not be forced to rely on the few attorneys who are funded by the government or foundations, or are charitably willing to accept an occasional case *pro bono publico* for the vindication of their constitutional and statutory rights. A practical system of compensation is crucial in encouraging a broader segment of the bar to become involved in representing otherwise unrepresented interests.

Courts have not yet addressed the problem of the defendant who is found not guilty of a criminal charge, but has been forced to exhaust all of his assets in order to obtain adequate representation. On the other hand, both federal and state courts tax costs, including in some states the cost of appointed counsel, against a defendant found guilty of a criminal charge. Perhaps the Congress should address this problem of reimbursement of costs to an innocent defendant.

While NLADA does not believe that the award of attorneys' fees in civil cases to legal services programs will replace the continuing need for increased funding for these programs, we do believe that it is essential that clients of legal services be treated on the same basis as clients of the private bar. Fees should be awarded to legal services programs in any appropriate case. The effects of such awards are highly beneficial. They encourage private lawyers to take similar cases, thus relieving the already overburdened programs. The award of fees increases the money available to the program to continue providing representation to poor persons. And, in appropriate cases, it forces the wrongdoer and not the taxpayer to bear the cost of the litigation.

Presently there is no prohibition against legal services programs accepting court awarded fees and some programs have received such awards. In fact, OEO regulations contemplate the receipt of fees by a Legal Services program and set forth the method of accounting for such fees. This regulation provides that the fees received for services by an OEO grantee Legal Services program become income to the program. Thus, such fees increase the amount of funds to be used to benefit the poor, and reduce the amount of increased public monies needed to fund Legal Services programs.

Moreover, the Code of Professional Responsibility in Canon 2, recognizes the ethical obligation of the legal profession to support legal services programs designed to fulfill the profession's responsibility to provide counsel to persons otherwise unable to afford necessary legal services. The awarding of attorneys' fees to indigent plaintiffs will further those ethical considerations by infusing private money into a system supported primarily by the Federal government. This, in turn, will allow for an increase in the number of persons served as well as an increase in available funds.

The public policy which supports claims for attorney fees by indigent litigants represented by legal services attorneys is succinctly stated by the court in *Ferrigno v. Ferrigno*, 115 N.J. Super. 283, 279 A. 2d 141 (1971):

"The law is not static; it changes to meet changing social needs. A considerable number of divorces in New Jersey are now obtained by indigents represented by Legal Services attorneys. I do not believe that a defendant husband against whom a judgment for divorce has been awarded benefits of free legal representation to his wife. Nor should a husband be encouraged to litigate under the assumption no counsel fee will be adjudged in favor of the indigent plaintiff represented by Legal Services. Put in another way, the public should be relieved from the financial burden of obtaining an indigent plaintiff's divorce or successfully defending against a husband's complaint, to the extent that the husband is able to pay all or part of her attorney's fee. The taxpayer has an interest in recovering where possible a portion of the costs in these situations."

To conclude, I would like to quote from the Supreme Court in *Boddie v. Connecticut*, 401 U.S. 371 (1971):

"Courts are the central dispute-settling institutions in our society. They are bound to do equal justice under law, to rich and poor alike. They fail to perform their function in accordance with the Equal Protection Clause if they shut their doors to indigent plaintiffs altogether. Where money determines not merely the kind of trial a man gets, . . . but whether he gets into court at all, the great principal of equal protection becomes a mockery."

Mr. ONEK. My name is Joseph Onek and I am the Director of the Center for Law and Social Policy. We are a foundation supported public interest law firm which means that we do not have to charge fees to our clients.

As the Chairman has already pointed out, this source of funding will not necessarily last forever. In this regard, I would like to bring to the Subcommittee's attention an excellent pamphlet put out by the Ford Foundation entitled "The Public Interest Law Firms. New Voices for New Constituencies." In this pamphlet the public interest law work funded by the foundation is described in rather glowing terms, but the pamphlet makes clear that the foundations tend to provide seed money for projects for a few years at most and then

they expect the recipients to make it on their own. The pamphlet goes on to suggest that Ford plans to continue providing support in public interest law only for about 5 years. So we and all other lawyers who are supported by foundations have given a great deal of thought to alternative sources of funding and one idea obviously that we have considered is court awarded fees. We are presently involved in litigation seeking those fees, but we are a Washington-based firm and much of our litigation is against the Federal Government, and at the present time, as we have already discussed here today, 28 USC 2412, makes it impossible for us or anybody to recover attorneys' fees from the United States Government except in a few isolated circumstances.

The subject has already been brought up but I would like to touch briefly on why I think the policy in 28 USC 2412 makes very little sense. If a person sues the Federal Government and he demonstrates in court that the Government has disobeyed the law, I think he should be eligible to receive attorneys' fees. After all it is the Government's obligation to see that the laws are obeyed and a person who sues the Government and wins has in effect done the Government's own work. He has served the function that an ombudsman might serve, a function that the Attorney General himself should be performing. He is serving as a private attorney general. And under those circumstances I think it makes perfect sense that he should be compensated by the Federal Government just as the Attorney General himself is compensated by the Federal Government and the taxpayers.

Now you have raised the point, Mr. Chairman, that taxpayers may object to or not wish to support this kind of litigation, particularly litigation against the Federal Government. I would like to emphasize the point Mr. Flannery has already mentioned, that in fact the taxpayer is already subsidizing litigation to an enormous extent because corporations and individuals can deduct legal fees as a business expense. I will give just a few hypothetical examples to make this clear.

If General Motors sues the Environmental Protection Agency over some provisions of the Clean Air Act or the Department of Transportation on a safety issue, the Federal Government, in effect, is subsidizing the suit by almost 50 percent. It makes no difference whether General Motors wins that suit or loses, they get that subsidy anyway. In fact, if General Motors brings the most frivolous suit imaginable and is thrown out of court on the first day, the Government will still provide a subsidy.

Furthermore, the Government exercises no control over the expenses it will subsidize. If General Motors chooses to pay its lawyers \$200 an hour the Government still pays one-half. If General Motors pays its lawyers to eat in the best restaurants and stay in the finest hotels, that is okay—Uncle Sam is going to pay half of it, no questions asked. This is totally different from any kind of fee award system we might have. Under an attorneys' fee statute the courts would exercise control over attorneys' fees and other costs of litigation.

You suggested, Mr. Chairman, that maybe the way to balance things out would be allow individuals to deduct their contributions to environmental groups or to groups that are involved in public interest litigation. This is done and it is helpful. But you have to remember a tax deduction is only valuable to somebody who has a large income. As you know, the vast majority of American taxpayers do not take individual deductions, they don't take charitable deductions; they simply fill out the standard 1040 form.

Now, as to your second point, I would like to be very, very frank. You suggest that the taxpayers would rise up in arms if section 2412 was repealed and litigants could recover from the Federal Government. I really wonder how true that is. We are talking about a very small amount of money. Certainly each taxpayer would not be paying more than 50 cents a year for the total attorneys' fees that would have to be paid. So I wonder who would really be the objectors. Wouldn't the real people yelling to Congress not be the individual taxpayer but precisely those interests who benefit from the present one-sided system—that is, the corporations who now get their deductions anyway. These are the people who benefit from the one-sided adversary system we now have, they would be the ones who would be up in arms, they would be the ones, speaking frankly, who would storm your office and ask "what is going on." I don't think individual taxpayers, particularly if this issue was explained to them and if they were told they were already paying for General Motors litigation costs, would cause that much difficulty. It will be those interests now benefiting from the present system. I do believe it can be explained to the taxpayer why it does make sense to have him pay some small amount, and I suggest although I don't have an economic study of this, it would be maybe 25 or 50 cents a year, to support litigation.

It also makes sense from the point of view of how our governmental system works. I think people would understand that it makes sense. For example, if a man is faced with a highway going through his home and he is going to have to pay \$25,000 in legal fees to fight it, taxpayers should each pay a small amount to give that man a chance to litigate. Each taxpayer would understand that the same thing might happen to him. This kind of risk distribution is what all insurance plans are about; it is essentially what many types of taxes are about. So I am not really worried about objections from the small individual taxpayers. I am worried that some larger taxpayers and some larger campaign contributors may object. Let's be candid about that.

Senator TUNNEY. I point out there is an interesting thing in my own experience. Since I have been in the Congress I have found that what "Middle Americans" object to the most is that portion of the anti-poverty program which allows moneys to be paid to lawyers who challenge local, State, and Federal governmental entities. That has been my experience for 9 years.

If you could have a plebiscite in my State on whether or not those funds should be paid to lawyers for those kinds of suits, I dare say by almost a 2 to 1 margin the vote would be in opposition.

Mr. ONEK. Well, I have two responses to that.

First of all, as Mr. Kline has pointed out, there is a very low income cut off for legal services. So, of course, "middle Americans," whoever they may be, who have legal problems themselves and who can't get an attorney for free are quite resentful about somebody who may have a slightly lower income who can get a free attorney. The whole point, I think it is mentioned in your opening statement regarding these hearings, is that it is not just the very poor who need legal fees, it is middle-class Americans. And an attorneys' fee system would give them a chance as well. Obviously middle-class Americans are not going to be too happy about a system that only gives the very poor the chance to get free legal services when they themselves cannot get legal services because the kind of cases they may want to bring cost far more than they can afford, even though they may earn \$10 or \$15,000.

Second, I doubt if these Americans have ever had it explained to them that the Federal Government is already subsidizing all suits against local, State and Federal governments when those are brought by corporations. When a corporation sues a local government on an environmental matter, on a zoning matter, the average American is already paying for that. I don't think they realize that. I think if they realized that their views might change. I agree there is hostility in many quarters to legal services and I think the best way to deal with that, like the best way to deal with the health care problem, is not to segregate out the people who get Federal funds but to have some more universal system so the middle class as well as the poor have a stake. If you do have a system, like the present legal services system, where only a small segment of society has a stake in the benefits then obviously the majority is going to be opposed to it, but that is not the way it should be. And I think that just as we are moving toward a more universal system of health care insurance we need more universal systems of aid in litigation.

In conclusion, I would like to comment on a proposal which has not been advanced here but which I think is sometimes advanced, that people who bring lawsuit and lose them should have to pay the attorneys' fees for the defendant. I would like to suggest that not only is this proposal unwise, since it would inhibit any group except the rich from bringing lawsuits but it may well be unconstitutional.

As Dean Bamberger pointed out, there may have been a time when litigation was looked on as an evil but that is no longer the case. The Supreme Court has made clear that the right to litigate, certainly on Federal issues, is a right protected by the first amendment. If a person, who in good faith, brings a suit but loses it can be required to pay the defendant's attorney fees, this will have a chilling effect on the exercise of his first amendment right to litigate. He would be paying an excessive cost for having the court determine the outcome of a lawsuit. I think the closest analogy is *New York Times v. Sullivan* and other cases dealing with the question of whether a newspaper can be sued for libel whenever it makes a false statement about a public figure. The Supreme Court has held, in order to advance first amendment values, that newspapers can only be sued

when they print a statement knowing it was false or with reckless disregard of whether it was false or not. A newspaper cannot be punished every time it makes some sort of honest mistake. Similarly, I believe the first amendment requires that persons who bring lawsuits involving Federal rights cannot be forced to pay a heavy penalty financially simply because they make an honest mistake in their evaluation of the law and the court rules against them. I think only if the plaintiffs file a lawsuit knowing it to be frivolous or with reckless disregard of whether it is frivolous or not, should they conceivably be asked to pay the defendants' attorneys' fees.

In conclusion, I would like to commend you, Mr. Chairman, and the Subcommittee for holding these hearings. I think, as the discussion this morning has already indicated, this is a very, very difficult problem and well worth the attention that you are paying to it.

Thank you.

Senator TUNNEY. Thank you.

[The testimony resumes at page 854. The prepared statement of Mr. Onek follows:]

PREPARED STATEMENT OF JOSEPH N. ONEK, DIRECTOR, CENTER FOR LAW AND SOCIAL POLICY

Mr. Chairman: My name is Joseph Onek and I am the Director of the Center for Law and Social Policy, a Washington-based public interest law firm. The Center was started four years ago to provide representation to previously unrepresented groups in our society. In the past four years, we have represented consumers, environmentalists, the mentally ill and charity hospital patients in a wide variety of administrative and judicial proceedings.

During these past four years, the Center has never charged clients a legal fee. We have been supported almost entirely by grants from such foundations as Ford, Rockefeller Brothers and Clark. It is our hope that we will continue to receive substantial foundation funding in the future. But we cannot be assured of that.

At this point, I would like to call the Subcommittee's attention to an excellent pamphlet put out by the Ford Foundation entitled, "The Public Interest Law Firm: New Voices and New Constituencies." This pamphlet describes in rather glowing detail the work of the public interest law firms funded by the Ford Foundation. However, the pamphlet points out that "foundations tend to provide 'seed money' for projects for a few years at most but they expect the recipients to make it on their own." The pamphlet then suggests that Ford plans to continue to provide support in public interest law for only about five years.

Since future foundation support is uncertain, we at the Center have given a great deal of attention to alternative sources of funding. We are, for example, involved in several cases dealing with attorneys' fees. But when we consider the possibility of attorneys' fees as a future source of support, an obvious problem presents itself. We are a Washington law firm and much of our litigation is against the federal government. Yet, under 28 U.S.C. §2412 it is impossible to recover attorneys' fees from the United States Government.

To my mind, this policy makes no sense. If a person sues the federal government and demonstrates that the government has disobeyed the law, he should be eligible to receive attorneys' fees. After all, it is the government's obligation to see that the laws are obeyed. A person who successfully sues the government has, in a sense, done the government's own work. In the language of recent cases, he has served as a private attorney general. I believe, therefore, that 28 U.S.C. §2412 should be repealed and that Congress should establish a system under which attorneys' fees can be obtained from the government in appropriate cases.

Now some people may believe it is inappropriate for the federal government to subsidize litigation, particularly litigation against itself. In this regard,

I think it is important to emphasize that the government is already subsidizing litigation to an enormous extent. Corporations and individuals deduct legal fees as a business expense. If General Motors sues the Environmental Protection Agency or the Department of Transportation, the federal government is, in effect, subsidizing that suit by almost 50%. Moreover, it makes no difference whether General Motors wins that suit or loses it. Even if General Motors brings the most frivolous suit imaginable, the government will provide a subsidy. And the government exercises no control of the expenses it will subsidize. If General Motors chooses to pay its lawyers \$200.00 an hour, the government still pays one half. If General Motors pays its lawyers to stay in the finest hotels and eat in the finest restaurants, that's fine—Uncle Sam will still pay one half. Under an attorneys' fees statute, by contrast, courts could and would exercise close supervision over attorneys' fees and the other costs of litigation.

The second possible objection to more liberal awarding of attorneys' fees is that it would lead to frivolous lawsuits and thus place a burden on our already overcrowded courts. This objection is totally unrealistic. Courts are not going to award attorneys' fees in frivolous cases, and so attorneys will have no financial incentive to bring such cases. The courts may, of course, be burdened by an increase in meritorious cases. But the solution to that problem is more courts, not fewer awards of attorneys' fees.

Finally, I would like to comment on the proposal, advanced by some, that persons who bring lawsuits and lose should then have to pay the attorneys' fees of the defendants. From a policy standpoint, this proposal is very unwise, since it would inhibit any individual or group which is not wealthy from bringing lawsuits. In addition, I believe that such a proposal is unconstitutional. The Supreme Court has made clear in several cases that the right to litigate federal issues is a right protected by the First Amendment. See *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963); *B'hd of RR Trainmen v. Virginia*, 377 U.S. 1 (1964). If persons who, in good faith, bring a non-frivolous but losing lawsuit, can be socked with paying the defendant's attorneys' fees, this would have a "chilling effect" on the exercise of their First Amendment right to litigate. They would be paying an excessive price for having wrongly determined the outcome of a lawsuit.

The closest analogy is *New York Times v. Sullivan*, 376 U.S. 254 (1964) and subsequent cases dealing with the question of whether a newspaper can be sued for liable whenever it makes a false statement about a public figure. The Supreme Court has held that, in order to advance First Amendment values, newspapers can be sued only when they print a statement knowing it was false or with reckless disregard of whether it was false or not. Newspapers cannot be financially punished every time they make an honest mistake.

Similarly, I believe the First Amendment requires that persons who bring lawsuits involving federal rights cannot be forced to pay a heavy financial penalty simply because they made an honest mistake in their evaluation of the law. Only if the plaintiffs file a lawsuit knowing it to be frivolous or with reckless disregard of whether it is frivolous or not, can they conceivably be asked to pay the defendant's attorneys' fees.

I wish to commend the Subcommittee for holding these important hearings and to thank you for inviting me to appear.

Senator TUNNEY. And now we have Mary Frances Derfner and Armand Derfner. Do you have the same statement?

Mr. DERFNER. Yes, we have a joint statement.

I am Armand Derfner of the Lawyers Committee for Civil Rights under Law and with me is Mary Frances Derfner who is also of the Lawyer's Committee and who is the author of the Committee's book entitled "Attorney's Fees in *Pro Bono Publico* Cases."

The Lawyers Committee is an organization devoted to involving as many members of the private bar in civil rights and public interest cases as possible and is interested in two major types of effects that attorneys' fees have. That is, we are interested in allowing certain people, whether funded by foundations or any other ways, to special-

ize and become centers of knowledge in specific areas of the law. We are also interested at the same time in making it possible for the average lawyer who may have a commercial or other kind of practice to take *pro bono* cases so that the average citizen anywhere in the country will be able to find a lawyer without having to find one of the very few foundations-funded or Government-funded lawyers who are located, as we have seen, in very few places in the country.

Some of the private lawyer's problems have been set forth by earlier witnesses here today. I just would like to refer briefly to one or two others.

First is the economic fact that a private lawyer's livelihood depends on collecting fees for his cases. *Pro bono* cases are frequently very complex, requiring massive amounts of research and fact-gathering time. The private lawyer can rarely afford to devote much time to nonpaying work when to do so would limit his ability to handle paying cases. The lawyer must not only limit the number of nonpaying cases he can accept, but also must limit the time he can spend on those he does accept.

The second major problem arises from the fact that *pro bono* activities, by their nature, often go against the grain of local mores. A southern lawyer who represents a school board seeking to avoid desegregation is paid a substantial amount, makes allies within the majority-white community, and receives what would be deemed "good" publicity; his opponent, representing poor black citizens who seek to enforce the law, is paid nothing, makes enemies within the majority-white community, and receives "bad" publicity. His practice will suffer as white, paying clients desert him; his contacts within the local bar will disappear; and the only business which will come his way by virtue of his representation is business from the poor community—those who would be as unable to pay to have a will drawn up as they are to fight desegregation and violation of the law.

Court awards of attorneys' fees would make it possible for a lawyer to take *pro bono* cases without jeopardizing his livelihood. No lawyer expects to get rich from court-ordered fees: The fee is normally quite low and it is ordinarily awarded only if the case is won. Even so, the prospect of court-awarded fees allows the *pro bono* case to "compete" with the paying case, in a way that affects lawyers of different kinds. The sole practitioner or member of a small firm can take a *pro bono* case without too great a financial sacrifice; some lawyers are able to devote themselves largely to public interest practice; and the public interest commitment of lawyers in larger firms is encouraged. Without court-ordered fees, the lawyer just cannot make a living, much less a comfortable living, unless he limits himself to practicing the type of law respected by the majority, and lets the poor go unrepresented. He may accept an occasional court-appointed criminal defense, but most problems of the minority will go unattacked, and most poor people with unpopular viewpoints will go unrepresented.

These problems are not simply the parochial concerns of lawyers. Encouraging adequate representation is essential if the laws of this Nation are to be enforced. Congress passes a great deal of lofty legis-

lation promising equal rights to all. But, although some of these laws can be enforced by the Justice Department or other agencies, most of the responsibility for enforcement has to rest upon private citizens. Private citizens must be given not only the right to go to court, but also the legal resources.

With court costs skyrocketing as the cost of living rises, only the relatively wealthy can have their day in court no matter what rights Congress promises. This amounts to nothing less than discrimination on the basis of wealth. Moreover, as the courts have realized, a denial of fees in certain situations is analogous to repealing the law which the citizen seeks to vindicate. It is difficult for me to believe that Congress wants legislation on the books but not enforced. To quote former Justice Tom Clark in a recent case in which the Supreme Court ordered fees paid to a lawyer who had won a union democracy case under the Landrum-Griffin Act:

Not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose * * * Counsel fees in cases of this kind are not only appropriate, they are imperative to preserve the Congressional purpose * * * Without counsel fees the grant of federal jurisdiction is but a gesture for a few union members could avail themselves of it. *Cole v. Hall*, 462 F. 2d 777, at 780-781 (2d Cir. 1972).

When Congress calls upon a private citizen to enforce its mandates, Congress simply cannot expect that citizen to become an unpaid law enforcement official, especially when those who are most often responsible for violations, Government officials and corporations, have their legal defenses subsidized.

The government—local, State or Federal—which violates the law has resources which the private citizen could never hope to accrue—resources which, unfortunately, it often spends hindering rather than furthering the public interest. Why should the public subsidize violations of the law of the land while the private citizen is left to pay to vindicate public policy?

And what about the corporate violator—the employer who discriminates in his employment practices or violates consumer protection laws? He normally has the funds to employ the best available legal counsel, and can then take his counsel fees and court costs off his income tax as a business expense.

Congress has increasingly recognized the difficulty which private enforcement poses. It recognized this difficulty as far back as a century ago, when it included attorneys' fee provisions in some of the Reconstruction Civil Rights Acts. And it has done likewise in the last decade, by providing for attorneys' fees in four anti-discrimination statutes: title II of the Civil Rights Act of 1964, prohibiting discrimination in public accommodations; title VII of the same act, prohibiting employment discrimination; the Fair Housing Act of 1968, prohibiting discrimination in the rental or sale of property; and section 718 of the Emergency School Aid Act of 1972, prohibiting racial discrimination in public schools. In all these statutes, there is a clear and integral relationship between awards of attorneys' fees and enforcement of the legislation.

I might just make a couple of points at this point and show just what that means.

In school desegregation cases, especially where Congress finally acted in 1972 to redress a longstanding imbalance, we find on calculation that all of the fees ever awarded by courts before that statute was passed, all the fees ever awarded to civil rights lawyers throughout all of the States in every case would not add up to the fees paid out by a single school board in a single middle size to average large case. I will give you a specific example, the Prince Edward County case, which was one of the serious instances of contemptuous violation of law, where schools were closed down, and where there were midnight raids on the treasury and where the Fourth Circuit with Judge Haynesworth sitting, among others, finally held this school board in contempt of court. We find in that case, which has gone on for nearly 15 years, there was only one phase during the entire case during which the plaintiffs' lawyers were awarded fees paid and that amounted to \$19,000.

During that same period, the school board lawyers, the county lawyers and the State's lawyers were getting their fees paid in full at all times. I do not know the total amount paid to these defendants' lawyers over the years but for the same period in which the plaintiffs' lawyers were awarded \$19,000, the defendants paid their lawyers \$150,000 for the service of having enabled them to go into contempt of court.

As an old time civil rights lawyer said to me the other day, "the school boards pay their lawyers, win, lose, or draw, day in and day out and yet we are on our own and we are to do the work of the Nation." That is really what this whole question is about.

Mr. Chairman, Congress has recognized in a great number of statutes that when it creates a cause of action, when it creates a right, the only way for that right to be enforced is to provide that someone who sues to enforce that right be given his attorneys' fees. Congress has recognized this not only in cases where private parties are defendants but has also recognized it in cases where State and local governmental bodies have been defendants and has recognized it where the Federal Government is the defendant. In the amendments to title VII in 1972, a provision was added making the Federal Government liable for employment discrimination committed by the Federal Government and liable not only for the same type of back pay and other awards that would be awarded in traditional title VII cases but liable as well as for attorney fees. So Congress has recognized increasingly that you must award attorneys' fees if you expect these rights to be real rather than paper rights.

I think that a number of formulas have been set forth which could easily form the basis of useful legislation. One that I might suggest for the Subcommittee's consideration is simply to give fees to all who sue successfully to enforce rights created or guaranteed by statutes that Congress has passed. These could be specific statutes such as title II or VII of the Civil Rights Acts of 1964, or a general statute such as 42 U.S.S. §1983, which authorizes a suit where a governmental official or one acting under a color of law denied a right guaranteed by the Federal Constitution or laws. We say that these statutes that Congress has passed represent Congress' judgment as to the

national interest and national policies. Where someone is forced to sue to vindicate one of those rights, Congress, by simply creating a right (or, in legal language, a "cause of action") in such a statute, by simply saying this is an important enough right to write it down in the law of the Nation, has decided that all of the remedies that are necessary to carry out those laws are applicable. Therefore, whenever someone is forced to sue to vindicate one of these rights, attorneys' fees should be paid.

I think there is some legislative history in some Reconstruction Acts, including what is now section 1983, that would support the idea that is precisely what Congress had in mind.

Senator TUNNEY. At what point?

Mr. DERFNER. In the debates.

Senator TUNNEY. At what point are the fees paid?

Mr. DERFNER. Ordinarily the fees are to be paid at the conclusion of the district court level but this is not an inflexible rule and the courts have awarded fees at earlier stages, say, on the denial of a motion to dismiss or at an earlier point in the case where it was clear that equity required that. So I don't think there is any bar to a rule or a statute or standard that would say that the ordinary practice of having fees wait until the outcome of the case must bend in certain cases where equity demands.

I might say in a case of my knowledge when the plaintiffs lawyer said, "Your Honor, I am afraid I am not going to be able to afford to finish this case," the judge made it clear to the defendants and to the lawyer that fees were going to be awarded. So there are many ways of avoiding inflexible rules. There are also many cases which make it clear you don't have to win in any formal sense to be awarded fees, as long as you prevail on certain important issues or you simply provide a benefit to the court. For example, in a reapportionment case in Louisiana, Judge Dawkins held that defendants' reapportionment plans for the parish in question was preferable to plaintiffs' plan and that the defendants' plan would therefore be put into effect. Nonetheless, he held that if it were not for the plaintiffs' careful exposition of the issues he would not have been aware of some of the law in the area and the case would not have been as thoroughly aired, so he awarded the plaintiffs fees on the basis of the substantial benefit they had provided through that litigation.

Unless Congress acts by creating a formula such as the one I have outlined or one of the other formulas suggested, it must expect that its most basic and fundamental legislation will be objectively repealed by the economic fact that the people those laws are meant to benefit and protect cannot take advantage of the law.

This Subcommittee has commendably addressed itself to a critical matter of national concern. I have high hopes that the work can result in something that can make sure the laws of this land will mean real rather than paper rights.

Thank you very much.

Senator TUNNEY. Thank you very much.

[The testimony resumes at page 1108. The prepared statement of Armand Derfner and exhibit prepared by Mary Frances Derfner follows:]

STATEMENT OF ARMAND DERFNER, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER
LAW

Mr. Chairman and members of the Subcommittee, I am Armand Derfner, of the Lawyers' Committee for Civil Rights Under Law. I want to thank you for your invitation to come here today to discuss court-awarded attorneys' fees.

In my statement I will be focusing on the important role attorneys' fees play in enabling private lawyers to become involved in *pro bono publico* cases. And, although my comments apply equally to all types of *pro bono* cases, the Lawyers' Committee's chief interest lies in traditional civil rights cases; that is, cases enforcing the rights of minority groups and poor people.

Since its organization in 1963 at the request of President John F. Kennedy, the Lawyers' Committee has devoted most of its energies to bringing the resources of the legal profession to bear on the legal problems of minorities and the poor. Through the efforts of the Committee's offices in Washington, D.C., Jackson, Mississippi, and ten other cities, hundreds of lawyers throughout the country are now contributing thousands of hours of high-quality legal services each year to cases and projects developed by the Committee. Based on our experience, we believe that neither the substantial commitment of members of the bar to the ideal of equal rights for all, nor the enormous contributions of government- or foundation-funded programs, can begin to meet the legal needs of minorities and the urban poor. The same high quality legal services easily available to those who can afford attorneys will in the long run become widely available to those who cannot pay only when they are able to retain lawyers on the same basis.

Private lawyers are in a unique position when confronted with public interest, voluntary representation. While lawyers affiliated with either government- or foundation-funded *pro bono* groups have many problems which court-awarded attorneys' fees would alleviate, private lawyers are faced with many additional problems. Let me outline some of these.

First is the economic fact that a private lawyer's livelihood depends on collecting fees for his cases. *Pro bono* cases are frequently very complex, requiring massive amounts of research and fact-gathering time. The private lawyer can rarely afford to devote much time to nonpaying work when to do so would limit his ability to handle paying cases. The lawyer must not only limit the number of nonpaying cases he can accept, but also must limit the time he can spend on those he does accept.

This economic fact of life is the single most severe limitation on public interest representation by the private bar. A sole practitioner, or one who practices with a few other lawyers, simply cannot take the time. A member of a larger firm possibly could take the time, but only at the expense of a feeling, on his own part or on the part of his associates, that he is not carrying his own weight.

The second major problem arises from the fact that *pro bono* activities, by their nature, often go against the grain of local mores. A Southern lawyer who represents a school board seeking to avoid desegregation is paid a substantial amount, makes allies within the majority-white community, and receives what would be deemed "good" publicity; his opponent, representing poor black citizens who seek to enforce the law, is paid nothing, makes enemies within the majority-white community, and receives "bad" publicity. His practice will suffer as white, paying clients desert him; his contacts within the local bar will disappear; and the only business which will come his way by virtue of his representation is business from the poor community—those who would be as unable to pay to have a will drawn up as they are to fight desegregation and violation of the law.

Nor does this problem apply only to the small or Southern community lawyer. Lawyers everywhere who represent clients with unpopular, albeit correct, legal positions cut themselves off from relationships with lawyers and paying clients which they need to make a living. The American Bar Association recognizes this problem in Canon 2 of its Code of Professional Ethics, which says that larger-than-usual fees are justified where acceptance of a case will likely preclude other employment. In a public interest case, the lawyer ordinarily gets not this larger fee, but no fee at all.

Court awards of attorneys' fees would make it possible for a lawyer to take *pro bono* cases without jeopardizing his livelihood. No lawyer expects to get rich from court-ordered fees: the fee is normally quite low and it is ordinarily awarded only if the case is won. Even so, the prospect of court-awarded fees allows the *pro bono* case to "compete" with the paying case. The sole practitioner or member of a small firm can take a *pro bono* case without too great a financial sacrifice; some lawyers will be able to devote themselves largely to public interest practice; and the public interest commitment of lawyers in larger firms will be encouraged. Without court-ordered fees, the lawyer just cannot make a living, much less a comfortable living, unless he limits himself to practicing the type of law respected by the majority, and lets the poor go unrepresented. He may accept an occasional court-appointed criminal defense, but most problems of the minority would go unattended, and most poor people with unpopular viewpoints would go unrepresented.

These problems are not simply the parochial concerns of lawyers. Encouraging adequate representation is essential if the laws of this nation are to be enforced. Congress passes a great deal of lofty legislation promising equal rights to all. But, although some of these laws can be enforced by the Justice Department or other agencies, most of the responsibility for enforcement has to rest upon private citizens. Private citizens must go to court to prove that they are being discriminated against, and to prove that laws which promise protection of the poor and minorities are being violated. This fact has been recognized in statutes specifically giving private citizens the right to go to court to redress grievances, and by court decisions which have broadly expanded the concepts of private causes of action, standing to sue, and citizen access to administrative proceedings. But for the most part, these broadened concepts exist only on paper, for Congress and the courts have stopped far short of taking measures which would permit citizens to take advantage of them. Private citizens must be given not only the right to go to court, but also the legal resources. As the Supreme Court said in interpreting the attorneys' fee authorization in Title II of the Civil Rights Act of 1964:

"When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. A Title II suit is thus private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401-02 (1968) (footnotes omitted).

With court costs skyrocketing as the cost of living rises, only the relatively wealthy can have their day in court, no matter what rights Congress promises. This amounts to nothing less than discrimination on the basis of wealth. Moreover, as the courts have realized, a denial of fees in certain situations is analogous to repealing the law which the citizen seeks to vindicate. It is difficult for me to believe that Congress wants legislation on the books but not enforced. To quote former Justice Tom Clark in a recent case in which the Supreme Court ordered fees paid to a lawyer who had won a union democracy case under the Landrum-Griffin Act:

"Not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose * * * Counsel fees in cases of this kind are not only appropriate, they are imperative to preserve the Congressional purpose * * * Without counsel fees the grant of federal jurisdiction is but a gesture for few union members could avail themselves of it." *Cole v. Hall*, 462 F.2d 777, at 780-81 (2d Cir. 1972).

When Congress calls upon a private citizen to enforce its mandates, Congress simply cannot expect that citizen to become an unpaid law enforcement official, especially when those who are most often responsible for violations, government officials and corporations, have their legal defenses subsidized.

The government—local, state or federal—which violates the law has resources which the private citizen could never hope to accrue—resources which, unfortunately, it often spends hindering rather than furthering the public interest. Why should the public subsidize violations of the law of the land while the private citizen must pay to vindicate public policy? Government, by virtue of almost unlimited funds, is already in an advantageous position; if attorneys' fees are denied the private citizen who brings suit to force his local, state or federal government to obey the law, government violators of the law are beyond reach.

And what about the corporate violator—the employer who discriminates in his employment practices or violates consumer protection laws? He normally has the funds to employ the best available legal counsel, and can then take his counsel fees and court costs off his income tax as a business expense. If, as is often the case, the corporation is a government contractor or is in a regulated industry, the expense is included in the base from which a guaranteed profit is calculated. The private citizen seeking to end discrimination or fraudulent business practices has none of these advantages.

Congress has increasingly recognized the difficulty which private enforcement poses. It recognized this difficulty as far back as a century ago, when it included attorneys' fee provisions in some of the Reconstruction Civil Rights Acts. And it has done likewise in the last decade, by providing for attorneys' fees in four antidiscrimination statutes: Title VII of the Civil Rights Act of 1964, prohibiting discrimination in employment practices; Title II of the same Act, prohibiting discrimination in public accommodations; the Fair Housing Act of 1968, prohibiting discrimination in the rental or sale of property; and Section 718 of the Emergency School Aid Act of 1972, prohibiting racial discrimination in public schools. In all these statutes, there is a clear and integral relationship between awards of attorneys' fees and enforcement of the legislation.

Some people have suggested that attorneys' fee provisions may be abused, pointing toward what they say are excessive fees in stockholders' derivative suits, black lung cases, and cases under the Criminal Justice Act. I do not believe these are serious dangers, for several reasons. First, most *pro bono* cases do not involve large—or, indeed, any—monetary recoveries, and therefore would not create the danger of large percentage fees. More important, the danger can be avoided by basing fees not on a monetary amount recovered but on the time spent, and by limiting fee awards to cases where a party has prevailed on the merits—or, in certain cases, performed a substantial service even without prevailing. Finally, the publicity about the Criminal Justice Act has focused on a few individuals who may have reported more time than was actually spent—a weakness within the control of judges—and has obscured the fact that the Criminal Justice Act has brought about an enormous improvement in the quality of defense provided in federal criminal cases.

The statutes which provide for fees have shown that attorneys' fees are invaluable in providing the legal resources necessary to implement national policy. Although courts have the authority to award fees in other *pro bono* cases, some courts decline to exercise this authority, taking the general view that Congress should speak first. Unless Congress does act, perhaps by enacting legislation broadly providing fees for anyone prevailing in the assertion of a federal claim (as plaintiff or defendant), it must expect its most basic and fundamental legislation to be objectively repealed by the economic fact that the people these laws are meant to benefit and protect cannot take advantage of the laws. If Congress does pass such legislation, private lawyers will be free to pursue the public interest without penalty. Lawyers who are funded by foundations will be freer to concentrate on specific areas, rather than covering the entire field of discrimination. And Congress will be able to rely upon the people to uphold its laws and further its mandates.

LAWYERS' COMMITTEE FOR CIVIL RIGHTS

ATTORNEYS' FEES IN PRO BONO PUBLICO CASES

A Compilation of Federal Court Cases

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- i -

I N D E X

Introduction page 1

Cases

Reapportionment Cases. series 100

School Cases series 200

Nonstatutory Awards - 42 U.S.C. §§ 1981, 1982 & 1983 series 300

Statutory Awards series 400

General. series 500

Labor Cases. series 600

Appendix A - *Statutes Authorizing And/Or Requiring the Payment
of Attorneys' Fees.* page A-1

Appendix B - Charts

Reapportionment Cases. page B-1

Schools. page B-3

Nonstatutory Awards - 42 U.S.C. §§ 1981-1983 page B-9

* * *

TABLE OF CASES

Acree v. County Board of Education of Richmond County, Georgia,
336 F. Supp. 1275 (S.D. Ga. 1972). 200.35

Adams v. Richardson, 356 F. Supp. 92 (D.D.C. 1973), *modified &*
aff'd, 480 F.2d 1159 (D.C. Cir. 1973)(*en banc*) 200.59

Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973)(*en banc*), *modi-*
fying & aff'g 356 F. Supp. 92 (D.D.C. 1973). 200.59

Allen v. County School Board of Prince Edward County, Virginia, un-
reported (E.D. Va. 1965), reprinted at 320 F. Supp. 1108-10. 200.02

Bassett v. Atlanta Independent School District, ____ F. Supp. ____
(E.D. Texas Aug. 22, 1972) 200.48

Bates v. Hinds, 334 F. Supp. 528 (N.D. Texas 1971) 200.26

Beach v. Franklin Parish School Board, ____ F. Supp. ____ (W.D.
La. Feb. 1, 1972). 100.16

<i>Beckett v. School Board of the City of Norfolk, Virginia</i> , ____ F. Supp. ____ (E.D. Va. Jan. 22, 1973) . . . . .	.200.32
<i>Beens v. Erdahl</i> , ____ F. Supp. ____ (D. Minn. Dec. 14, 1972) . . . . .	.100.91
<i>Bell v. School Board of Powhatan County, Virginia</i> , 321 F.2d 494 (4th Cir. 1963)(<i>en banc</i>) . . . . .	.200.06
<i>Berry v. Macon County Board of Education</i> , ____ F. Supp. ____ (M.D. Ala. July 22, 1971). . . . .	.200.40
<i>Betts v. County School Board of Halifax County, Virginia</i> , 269 F.2d 593 (W.D. Va. 1967). . . . .	.200.12
<i>Black v. Curb</i> , ____ F. Supp. ____ (S.D. Ala. July 9, 1973) . . . . .	.300.41
<i>Blankenship v. Boyle</i> , 79 L.R.R.M. 2183 (D.D.C. 1972) . . . . .	.600.04
<i>Blumenthal v. Lee Memorial Hospital</i> , ____ F. Supp. ____ (E.D. Ark. Aug. 6, 1971). . . . .	.300.20
<i>Bradley v. School Board of the City of Richmond, Virginia</i> , 345 F.2d 310 (4th Cir. 1965)(<i>en banc</i>). . . . .	.200.01
<i>Bradley v. School Board of the City of Richmond, Virginia</i> , 53 F.R.D. 28 (E.D. Va. 1971), <i>rev'd</i> , ____ F.2d ____ (4th Cir. Nov. 29, 1972)(<i>en banc</i>). . . . .	.200.01
<i>Bradley v. School Board of the City of Richmond, Virginia</i> , ____ F.2d ____ (4th Cir. Nov. 29, 1972) (<i>en banc</i>), <i>rev'g</i> 53 F.R.D. 28 (E.D. Va. 1971) . . . . .	.200.01
<i>Brewer v. School Board of the City of Norfolk, Virginia</i> , 456 F.2d 943 (4th Cir. 1972)(<i>en banc</i>), <i>on remand sub nom. Beckett</i> <i>v. School Board of the City of Norfolk, Virginia</i> , ____ F. Supp. ____ (E.D. Va. Jan. 22, 1973). . . . .	.200.32
<i>Briscoe v. Jefferson Davis Parish Police Jury</i> , ____ F. Supp. ____ (W.D. La. Sept. 2, 1972). . . . .	.100.15
<i>Brown v. Ballas</i> , 331 F. Supp. 1033 (N.D. Texas 1971) . . . . .	.300.03
<i>Brown v. County School Board of Frederick County, Virginia</i> , 327 F.2d 655 (4th Cir. 1964)(<i>en banc</i>). . . . .	.200.14
<i>Brown v. County School Board of Frederick County, Virginia</i> , 234 F. Supp. 808 (W.D. Va. 1964), <i>remanded on other grounds</i> , 346 F.2d 22 (4th Cir. 1964)(<i>en banc</i>) . . . . .	.200.14
<i>Buckner v. County School Board of Greene County, Virginia</i> , 332 F.2d 452 (4th Cir. 1964)(<i>en banc</i>). . . . .	.200.07

<i>Burch v. International Association of Machinists & Aerospace Workers, AFL-CIO</i> , 78 L.R.R.M. 2442 (S.D. Fla. 1971), <i>aff'd</i> , 78 L.R.R.M. 3072 (5th Cir. 1971).	600.02
<i>Burch v. International Association of Machinists & Aerospace Workers, AFL-CIO</i> , 78 L.R.R.M. 2444 (S.D. Fla. 1971)	600.03
<i>Burt v. Edgefield County Board of Education</i> , ____ F. Supp. ____ (D.S.C. Oct. 11, 1973)	200.52
<i>Callahan v. Sanders</i> , 339 F. Supp. 814 (M.D. Ala. 1971), <i>rev'd in part</i> , ____ F.2d ____ (5th Cir. Sept. 11, 1972)	300.22
<i>Callahan v. Wallace</i> , ____ F.2d ____ (5th Cir. Sept. 11, 1972), <i>rev'g in part</i> 339 F. Supp. 814 (M.D. Ala. 1971)	300.22
<i>Carpenter v. Toler</i> , ____ F. Supp. ____ (N.D. Miss. May 26, 1971)	100.04
<i>Cato v. Parham</i> , 293 F. Supp. 1375 (E.D. Ark. 1968), <i>aff'd</i> , 403 F.2d 12 (8th Cir. 1968)	200.04
<i>Cato v. Parham</i> , 403 F.2d 12 (8th Cir. 1968), <i>aff'g</i> 293 F. Supp. 1375 (E.D. Ark. 1968)	200.04
<i>Cefalo v. International Union of District 50 United Mine Workers of America</i> , 311 F. Supp. 946 (D.D.C. 197)	600.12
<i>Chisley v. Richland Parish School Board</i> , ____ F. Supp. ____ (W.D. La. July 9, 1973)	200.57
<i>Clark v. American Marine Corporation</i> , 320 F. Supp. 709 (E.D. La. 1970)	400.05
<i>Clark v. Board of Education of the Little Rock School District</i> , 449 F.2d 493 (8th Cir. 1971) (<i>en banc</i>)	200.33
<i>Clark v. DeSoto Parish Police Jury</i> , ____ F. Supp. ____ (W.D. La. June 14, 1972)	100.14
<i>Cole v. Hall</i> , 462 F.2d 777 (2d Cir. 1972), <i>aff'd</i> , 412 U.S. 1 (1973)	600.11
<i>Cole v. The School Board of the City of Petersburg, Virginia</i> , ____ F. Supp. ____ (E.D. Va. Aug. 10, 1972)	200.45
<i>Commonwealth of Pennsylvania v. Charleroi Area School District</i> , ____ F. Supp. ____ (W.D. Pa. Oct. 5, 1973)	300.35
<i>Cooper v. Allen</i> , 5 E.P.D. ¶ 7952 (5th Cir. 1972)	300.28
<i>Coppedge v. Franklin County Board of Education</i> , 404 F.2d 1177 (4th Cir. 1968) (<i>en banc</i>)	200.50

<i>Cornist v. Richland Parish School Board</i> , ____ F. Supp. ____ (W.D. La. La. July 9, 1973)	200.57
<i>Crawford v. Board of Education of the City of Los Angeles, California</i> , Cal. Super. Ct., Los Angeles County, Feb. 11, 1970	200.30
<i>Cross v. United Mine Workers of America</i> , 353 F. Supp. 304 (S.D. Ill. 1973)	600.15
<i>Cunningham v. Board of Education of the Benton School District No. 8, Benton, Arkansas</i> , ____ F. Supp. ____ (E.D. Ark. Sept. 11, 1969)	200.38
<i>Damon v. Lauderdale County Board of Supervisors</i> , 254 F. Supp. 918 (S.D. Miss. 1966) (three-judge court)	100.03
<i>Doe v. Swoap</i> , ____ F. Supp. ____ (N.D. Cal. Oct. 26, 1973)	300.47
<i>Doherty v. Wilson</i> , 356 F. Supp. 35 (M.D. Ga. 1973)	200.53
<i>Donahue v. Staunton</i> , 471 F.2d 975 (7th Cir. 1972)	300.49
<i>Downs v. Conway School District</i> , ____ F. Supp. ____ (E.D. Ark. June 23, 1971)	200.28
<i>Dyer v. Love</i> , 307 F. Supp. 974 (N.D. Miss. 1969)	100.01
<i>Eaton v. New Hanover County Board of Education</i> , 459 F.2d 684 (4th Cir. 1972) (en banc)	200.47
<i>Fairley v. Patterson</i> , ____ F. Supp. ____ (S.D. Miss. Feb. 20, 1973)	100.21
<i>Farber v. Rizzo</i> , 363 F. Supp. 386 (E.D. Pa. 1973)	300.48
<i>Felder v. Harnett County, N.C., Board of Education</i> , 409 F.2d 1070 (4th Cir. 1969) (en banc)	200.21
<i>Ferrigno v. Ferrigno</i> , 279 A.2d 141 (N.J. 1971)	500.08
<i>Ferrington v. Franklin Parish Police Jury</i> , ____ F. Supp. ____ (W.D. La. Feb. 1, 1972)	100.16
<i>Fleischmann Distilling Corp. v. Maier Brewing Co.</i> , 386 U.S. 714 (1967)	500.02
<i>Food Store Employees Union v. NLRB</i> , ____ F.2d ____ (D.C. Cir. March 21, 1973)	600.16
<i>Ford v. White</i> , ____ F. Supp. ____ (S.D. Miss. Aug. 3, 1972)	300.24
<i>Fowler v. Schwarzwald</i> , ____ F. Supp. ____ (D. Minn. Jan. 4, 1973)	300.45

- v -

<i>Franklin v. County School Board of Giles County, Virginia</i> , 242 F. Supp. 371 (W.D. Va. 1965), <i>rev'd on other grounds</i> , 360 F.2d 325 (4th Cir. 1965) (<i>en banc</i>) . . . . .	.200.22
<i>Gaddis v. Wyman</i> , 336 F. Supp. 1225 (S.D.N.Y. 1972). . . . .	.300.18
<i>Gartner v. Soloner</i> , 384 F.2d 348 (3d Cir. 1967) . . . . .	.600.05
<i>Gates v. Collier</i> , ____ F. Supp. ____ (N.D. Miss. Feb. 14, 1973, <i>aff'd</i> , ____ F.2d ____ (5th Cir. Dec. 5, 1973) . . . . .	.300.38
<i>Gates v. Collier</i> , ____ F.2d ____ (5th Cir. Dec. 5, 1973), <i>aff'g</i> ____ F. Supp. ____ (N.D. Miss. Feb. 14, 1973). . . . .	.300.38
<i>Gibbs v. Blackwelder</i> , 346 F.2d 943 (4th Cir. 1965) . . . . .	.500.05
<i>Gilbert v. Hoisting & Portable Engineers, Local Union No. 701</i> , <i>of the International Union of Operating Engineers</i> , 384 P.2d 136 (S. Ct. Ore. 1963) (<i>en banc</i>). . . . .	.600.18
<i>Gilbert v. Hoisting & Portable Engineers, Local Union No. 701</i> , <i>of the International Union of Operating Engineers</i> , 390 P.2d 320 (S. Ct. Ore. 1964) (<i>en banc</i>). . . . .	.600.18
<i>Gilliam v. School Board of the City of Hopewell, Virginia</i> , ____ F. Supp. ____ (E.D. Va. Aug. 11, 1972). . . . .	.200.44
<i>Gonzales v. Fairfax-Brewster School, Inc.</i> , ____ F. Supp. ____ (E.D. Va. July 27, 1973) . . . . .	.200.55
<i>Griffin v. County School Board of Prince Edward County, Vir-</i> <i>ginia</i> , 363 F.2d 206 (4th Cir. 1966) (<i>en banc</i>), <i>cert. denied</i> , 385 U.S. 960 (1966) . . . . .	.200.02
<i>Haining v. Roberts</i> , 320 F. Supp. 1054 (S.D. Miss. 1970) (Three- Judge Court). . . . .	.300.06
<i>Hall v. Cole</i> , 412 U.S. 1 (1973), <i>aff'g</i> 462 F.2d 777 (2d Cir. 1972) . . . . .	.600.11
<i>Hamilton v. Landrieu, Mayor of New Orleans</i> , ____ F. Supp. ____ (E.D. La. June 28, 1973) . . . . .	.300.42
<i>Hamilton v. Love</i> , 358 F. Supp. 338 (E.D. Ark. 1973) . . . . .	.300.43
<i>Hammond v. Housing Authority & Urban Renewal Agency of Lane</i> <i>County, Oregon</i> , 328 F. Supp. 586 (D. Ore. 1971) . . . . .	.300.12
<i>Hargrove v. Caddo Parish School Board</i> , ____ F. Supp. ____ (W.D. La. June 13, 1972). . . . .	.100.13
<i>Harper v. Mayor & City Council of Baltimore, Md.</i> , 5 FEP Cases 1050 (D. Md. 1973). . . . .	.300.39

<i>Hegler v. Board of Education of the Bearden School District, Bearden, Arkansas</i> , 447 F.2d 1078 (8th Cir. 1971)	200.23
<i>Highway Truck Drivers and Helpers Local 107, of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Cohen</i> , 220 F. Supp. 735 (E.D. Pa. 1963)	400.04
<i>Hill v. Franklin County Board of Education</i> , 390 F.2d 583 (6th Cir. 1968)	200.03
<i>Horton v. Lawrence County Board of Education</i> , 449 F.2d 393 (5th Cir. 1971)	200.24
<i>Incarcerated Men of Allen County v. Fair</i> , ____ F. Supp. ____ (N.D. Ohio Oct. 5, 1973)	300.37
<i>International Union of District 50, United Mine Workers of America v. Bowman Transportation, Inc.</i> , 421 F.2d 934 (5th Cir. 1970)	600.13
<i>James v. Beaufort County Board of Education</i> , ____ F. Supp. ____ (Civ. No. 680, E.D.N.C. Nov. 11, 1971)	200.25
<i>James v. Beaufort County Board of Education</i> , ____ F.2d ____ (No. 72-1065, 4th Cir. Nov. 29, 1972) (<i>en banc</i>)	200.25
<i>Jeanty v. McKey & Poague</i> , ____ F. Supp. ____ (N.D. Ill. May 3, 1973)	400.11
<i>Jinks v. Mays</i> , 464 F.2d 1223 (5th Cir. 1972)	300.29
<i>Jinks v. Mays</i> , ____ F. Supp. ____ (Civil Action No. 13977, N.D. Ga. Nov. 22, 1972)	300.29
<i>Johnson v. Combs</i> , ____ F. Supp. ____ (N.D. Texas Sept. 8, 1972), <i>aff'd in part & vacated in part</i> , ____ F.2d ____ (5th Cir. Dec. 6, 1972)	200.49
<i>Johnson v. Combs</i> , ____ F.2d ____ (5th Cir. Dec. 6, 1972), <i>aff'g in part & vacating in part</i> ____ F. Supp. ____ (N.D. Texas Sept. 8, 1972)	200.49
<i>Johnson v. Combs</i> , ____ F. Supp. ____ (N.D. Texas Aug. 14, 1973)	200.49
<i>Jones v. Holliman</i> , ____ F. Supp. ____ (S.D. Ala. July 9, 1973)	300.40
<i>Jones v. Seldon's Furniture Warehouse, Inc.</i> , 357 F. Supp. 886 (E.D. Va. 1973)	400.10
<i>Jordan v. Mahoning County Board of Elections</i> , ____ F. Supp. ____ (N.D. Ohio May 19, 1972)	100.22

<i>Karstetter v. Evans</i> , ____ F. Supp. ____ (Civil Action No. 7-573, N.D. Texas Dec. 7, 1971) . . . . .	.200.31
<i>Kelley v. Altheimer, Arkansas, Public School District No. 22</i> , 297 F. Supp. 753 (E.D. Ark. 1969) . . . . .	.200.09
<i>Kelly v. Guinn</i> , 456 F.2d 100 (9th Cir. 1972) . . . . .	.200.41
<i>Kemp v. Beasley</i> , 352 F.2d 14 (8th Cir. 1965) . . . . .	.200.15
<i>Kerr v. City of Chicago</i> , 424 F.2d 1134 (7th Cir. 1970) . . . . .	.300.04
<i>Kitching v. Bobo</i> , ____ F. Supp. ____ (No. DC 7082-K, N.D. Miss. May 24, 1971) . . . . .	.100.05
<i>Knight v. Auciello</i> , ____ F.2d ____ (No. 71-1108, 1st Cir. Jan. 17, 1972) . . . . .	.300.09
<i>Langford v. City of Texarkana, Arkansas</i> , ____ F.2d ____ (8th Cir. April 25, 1973) . . . . .	.300.30
<i>La Raza Unida v. Volpe</i> , ____ F. Supp. ____ (No. C-71-1166 RFP, N.D. Cal. Oct. 19, 1972) . . . . .	.500.09
<i>Lea v. Cone Mills Corp.</i> , 438 F.2d 86 (4th Cir. 1971) . . . . .	.400.03
<i>Lea v. Cone Mills Corp.</i> , ____ F.2d ____ (No. 71-1852, 4th Cir. Sept. 11, 1972) . . . . .	.400.03
<i>Lee v. Southern Home Sites Corp.</i> , 429 F.2d 290 (5th Cir. 1970) . . . . .	.300.01
<i>Lee v. Southern Home Sites Corp.</i> , 444 F.2d 143 (5th Cir. 1971) . . . . .	.300.01
<i>Local 4076, United Steelworkers of America v. United Steelworkers of America, AFL-CIO, Local 1465, United Steelworkers of America, and Woodings-Verona Tool Works</i> , 338 F. Supp. 1154 (W.D. Pa. 1972) . . . . .	.600.09
<i>London v. East Feliciana Parish Police Jury</i> , ____ F. Supp. ____ (No. 71-306, E.D. La. May 16, 1972) . . . . .	.100.12
<i>Lyle v. Teresi</i> , 327 F. Supp. 683 (D. Minn. 1971) . . . . .	.300.15
<i>Mapp v. Board of Education of City of Chattanooga, Tennessee</i> , 341 F. Supp. 193 (E.D. Tenn. 1972) . . . . .	.200.43
<i>Martinolich v. Dean</i> , 256 F. Supp. 612 (S.D. Miss. 1966) . . . . .	.100.02
<i>Martinolich v. Dean</i> , ____ F. Supp. ____ (Civil Action No. 3111, S.D. Miss. April 4, 1972) . . . . .	.100.02

<i>McBeth v. Board of Education of the Devalls Bluff School</i> District No. 1, Dewalls Bluff, Arkansas, ____ F. Supp. ____ (No. LR-68-C-206, E.D. Ark. June 20, 1969) . . . . .	.200.37
<i>McEnteggart v. Cataldo</i> , 451 F.2d 1109 (1st Cir. 1971) . . . . .	.200.36
<i>McLaurin v. Columbia Municipal Separate School District</i> 478 F.2d 348 (5th Cir. 1973). . . . .	.200.51
<i>Miller v. Amusement Enterprises, Inc.</i> , 426 F.2d 534 (5th Cir. 1970). . . . .	.400.02
<i>Mills v. Electric Auto-Lite Co.</i> , 396 U.S. 375 (1970). . . . .	.500.03
<i>Monroe v. Board of Education of Madison County, Tennessee</i> , 269 F. Supp. 758 (W.D. Tenn. 1965), remanded, 380 F.2d 955 (6th Cir. 1967), vacated, 391 U.S. 450 (1968) . . . . .	.200.18
<i>Monroe v. Board of Commissioners, City of Jackson, Tennes-</i> <i>see</i> , 244 F. Supp. 353 (W.D. Tenn. 1965), remanded, 380 F.2d 955 (6th Cir. 1967), vacated, 391 U.S. 450 (1968) . . . . .	.200.19
<i>Moore v. Knowles</i> , ____ F. Supp. ____ (N.D. Texas Oct. 28, 1971), vacated, 482 F.2d 1069 (5th Cir. 1973) . . . . .	.200.27
<i>Moore v. Knowles</i> , 482 F.2d 1069 (5th Cir. 1973), vacating ____ F. Supp. ____ (N.D. Texas Oct. 28, 1971) . . . . .	.200.27
<i>Morrow v. Crisler</i> , ____ F. Supp. ____ (Civil Action No. 4716, S.D. Miss. Sept. 29, 1971). . . . .	.300.02
<i>NAACP v. Allen</i> , 340 F. Supp. 703 (M.D. Ala. 1972) . . . . .	.300.13
<i>NAACP, Minden Chapter v. Webster Parish School Board</i> , ____ F. Supp. ____ (W.D. La. July 9, 1973).	100.18
<i>Nesbit v. Statesville City Board of Education</i> , 418 F.2d 1040 (4th Cir. 1969) (<i>en banc</i>). . . . .	.200.08
<i>Newbern v. Lake Lorelei, Inc.</i> , 308 F. Supp. 407 (S.D. Ohio 1968) . . . . .	.300.08
<i>Newman v. Alabama</i> , ____ F. Supp. ____ (Civil Action No. 3501-N, M.D. Ala. Oct. 4, 1972) . . . . .	.300.25
<i>Newman v. Piggie Park Enterprises</i> , 390 U.S. 400 (1968). . . . .	.400.01
<i>Northcross v. Board of Education of the Memphis City Schools</i> , 412 U.S. 427 (1973)	200.58
<i>Office of Communication of the United Church of Christ v.</i> <i>Federal Communications Commission</i> , ____ F.2d ____ (No. 24,672, D.C. Cir. March 28, 1972) . . . . .	.500.06

<i>Ojeda v. Hackney</i> , 452 F.2d 947 (5th Cir. 1972) . . . . .	.300.16
<i>Pegues v. Bakane</i> , ____ F.2d ____ (No. 30385, 5th Cir. July 27, 1971) . . . . .	.300.11
<i>Peoples v. Doughtie</i> , ____ F. Supp. ____ (No. 1150-S, M.D. Ala. Nov. 19, 1971) . . . . .	.300.10
<i>Pettaway v. County School Board of Surry County, Virginia</i> , 230 F. Supp. 480 (E.D. Va. 1964) . . . . .	.200.05
<i>Pickens v. Okolona Municipal Separate School District</i> , ____ F. Supp. ____ (No. EC6956, N.D. Miss. Aug. 11, 1971) . . . . .	.200.29
<i>Pina v. Homs</i> , ____ F. Supp. ____ (Civil Action No. 69-666-G, D. Mass. July 9, 1969) . . . . .	.300.14
<i>Pyramid Lake Paiute Tribe of Indians v. Morton</i> , ____ F. Supp. ____ (D.D.C. June 22, 1973) . . . . .	.500.11
<i>Quad-Cities Community News Service, Inc. v. Jebens</i> , 334 F. Supp. 8 (S.D. Iowa 1971) . . . . .	.300.31
<i>Rainey v. Jackson State College</i> , ____ F. Supp. ____ (S.D. Miss. Jan. 18, 1972) . . . . .	.200.34
<i>Rainey v. Jackson State College</i> , 481 F.2d 347 (5th Cir. 1973) . . . . .	.200.34
<i>Ratner v. Chemical Bank New York Trust Co.</i> , 329 F. Supp. 270 (S.D.N.Y. 1971) . . . . .	.400.08
<i>Ratner v. Chemical Bank New York Trust Co.</i> , 54 F.R.D. 412 (S.D.N.Y. 1972) . . . . .	.400.08
<i>Reed v. Quave</i> , ____ F. Supp. ____ (No. 3146, S.D. Miss. May 30, 1967) . . . . .	.100.11
<i>Reed v. Quave</i> , ____ F. Supp. ____ (No. 3146, S.D. Miss. May 14, 1971) . . . . .	.100.11
<i>Retail Clerks International Association, Local Union No. 201 v. Lane County Independent Grocery Employers Committee</i> , 81 L.R.R.M. 2671 (D. Ore. 1972) . . . . .	.600.14
<i>Retail Clerks Union, Local 648 v. Retail Clerks International Association</i> , 299 F. Supp. 1012 (D.D.C. 1969) . . . . .	.600.08
<i>Richardson v. Hotel Corporation of America</i> , 332 F. Supp. 519 (E.D. La. 1971) . . . . .	.400.12

- x -

<i>Roberts v. Wilson</i> , ____ F. Supp. ____ (Civil Action No. 1436-71, D.D.C. Oct. 3, 1972) . . . . .	.300.26
<i>Rogers v. Paul</i> , 232 F. Supp. 833 (W.D. Ark. 1964) . . . . .	.200.17
<i>Rogers v. Paul</i> , 345 F.2d 117 (8th Cir. 1965), <i>rev'd on other grounds</i> , 382 U.S. 198 (1965). . . . .	.200.17
<i>Rogers v. Board of Education of Little Rock, Arkansas, School District</i> , 281 F. Supp. 39 (E.D. Ark. 1968). . . . .	.200.17
<i>Rolax v. Atlantic Coast Line R.R.</i> , 186 F.2d 473 (4th Cir. 1971) . . . . .	.600.01
<i>Rolfe v. County Board of Education of Lincoln County, Tennessee</i> , 282 F. Supp. 192 (E.D. Tenn. 1966), <i>aff'd</i> , 391 F.2d 77 (6th Cir. 1968). . . . .	.200.10
<i>Ross v. Goshi</i> , 351 F. Supp. 9494 (D. Haw. 1972) . . . . .	.300.44
<i>Sanders v. Russell</i> , 401 F.2d 241 (5th Cir. 1968). . . . .	.500.04
<i>Sands v. Abelli</i> , 220 F. Supp. 677 (S.D.N.Y. 1968) . . . . .	.600.06
<i>Scott v. Burkes</i> , ____ F. Supp. ____ (No. 4782, S.D. Miss. April 29, 1971) . . . . .	.100.08
<i>Shull v. Columbus Municipal Separate School District</i> , 338 F. Supp. 1376 (N.D. Miss. 1972) . . . . .	.300.21
<i>Sierra Club v. Lynn</i> , ____ F. Supp. ____ (W.D. Tex. June 28, 1973) . . . . .	.500.13
<i>Sigalas v. Cumbest</i> , ____ F. Supp. ____ (Civil Action No. 3239, S.D. Miss. Feb. 18, 1970) . . . . .	.100.07
<i>Sims v. Amos</i> , 340 F. Supp. 691 (M.D. Ala. 1972) (Three-Judge Court). . . . .	.100.10
<i>Sincock v. Obara</i> , 320 F. Supp. 1098 (D. Del. 1970) (Three- Judge Court). . . . .	.100.09
<i>Smith v. Hill</i> , 285 F. Supp. 556 (E.D.N.C. 1968) . . . . .	.300.19
<i>Smith v. Medgar Evers Comprehensive Health Center</i> , ____ F. Supp. ____ (Civil Action No. 72W-26, S.D. Miss. Nov. 7, 1972) . . . . .	.300.27
<i>Sprague v. Ticonic National Bank</i> , 307 U.S. 161 (1939) . . . . .	.500.01
<i>Stacy v. Williams</i> , 50 F.R.D. 52 (N.D. Miss. 1970) (Three-Judge Court), <i>aff'd</i> , 446 F.2d 1366 (5th Cir. 1971). . . . .	.300.05

- xi -

<i>Stafford v. Southern Farm Bureau Casualty Insurance Co.,</i> 457 F.2d 366 (8th Cir. 1972)	500.07
<i>The Stanford Daily v. Zurcher, _____ F. Supp. _____</i> (N.D. Cal. Aug. 10, 1973)	300.30
<i>Sterzing v. Fort Bend Independent School District, _____ F.</i> <i>Supp. _____</i> (Civil Action No. 69-H-319, S.D. Texas May 5, 1972)	200.39
<i>Stolberg v. Members of the Board of Trustees for the State</i> <i>Colleges of the State of Connecticut, 474 F.2d 485</i> (2d Cir. 1973)	200.56
<i>Taylor v. City of Millington, Tennessee, _____ F. Supp. _____</i> (Civil Action No. 71-249, W.D. Tenn. April 25, 1972)	300.23
<i>Taylor v. Perini, _____ F. Supp. _____</i> (N.D. Ohio May 23, 1973)	300.36
<i>Terry v. Elmwood Cemetery, 307 F. Supp. 269</i> (N.D. Ala. 1969)	300.07
<i>Thomas v. Honeybrook Mines, Inc., 428 F.2d 981</i> (3d Cir. 1970), <i>rehearing denied, 428 F.2d 988</i> (3d Cir. 1970)	600.19
<i>Thomas v. Honeybrook Mines, Inc., _____ F. Supp. _____</i> (M.D. Pa. April 18, 1973)	600.19
<i>Thompson v. Richland Parish Police Jury, _____ F. Supp. _____</i> (W.D. La. Aug. 31, 1972), <i>aff'd, _____ F.2d _____</i> (5th Cir. June 13, 1973)	100.17
<i>Thompson v. The School Board of the City of Newport News,</i> <i>Virginia, _____ F. Supp. _____</i> (Civil Action No. 102-70-N, E.D. Va. Aug. 12, 1971)	200.42
<i>Thompson v. School Board of the City of Newport News, Virgin-</i> <i>ia, 465 F.2d 83</i> (4th Cir. 1972) (<i>en banc</i>)	200.42
<i>Thompson v. School Board of the City of Newport News, Virginia,</i> <i>472 F.2d 177</i> (4th Cir. 1972) (<i>en banc</i>)	200.42
<i>Thompson v. School Board of the City of Newport News, Virginia,</i> <i>363 F. Supp. 458</i> (E.D. Va. 1973)	200.42
<i>Thorn v. Richardson, _____ F. Supp. _____</i> (No. 9577, W.D. Wash. Dec. 10, 1971)	400.06
<i>Tiidee Products, Inc., 194 N.L.R.B. No. 198, 79 L.R.R.M.</i> <i>1175</i> (1962)	600.07
<i>Traynham v. County School Board of Halifax County, Vir-</i> <i>ginia, 418 F.2d 1040</i> (4th Cir. 1969) (<i>en banc</i>)	200.08

<i>Tucker v. County School Board of Amherst County, Virginia</i> , 418 F.2d 1040 (4th Cir. 1969)(en banc)	200.08
<i>Turner v. McKeithen</i> , ____ F. Supp. ____ (W.D. La. July 9, 1973).	100.20
<i>United States v. Gila River Pima-Maricopa Indian Community</i> , 391 F.2d 53 (9th Cir. 1968).	500.10
<i>United States v. Gray</i> , 319 F. Supp. 871 (D.R.I. 1970).	400.07
<i>United States of America v. Local Union No. 3, International Union of Operating Engineers</i> , ____ F. Supp. ____ (N.D. Cal. Nov. 8, 1973).	400.09
<i>United States v. McLeod</i> , 385 F.2d 734 (5th Cir. 1967).	300.46
<i>United States v. Texas</i> , ____ F. Supp. ____ (E.D. Texas April 30, 1973).	200.54
<i>United States Steel Corporation v. United Mine Workers of America</i> , 79 L.R.R.M. 2518 (3d Cir. 1972).	600.20
<i>United Steelworkers of America, AFL-CIO v. Butler Mfg. Co.</i> , 439 F.2d 1110 (8th Cir. 1971).	600.17
<i>Webb v. Baxley</i> , ____ F. Supp. ____ (M.D. Ala. Jan. 18, 1973)	300.32
<i>Welch v. Rhodes</i> , ____ F. Supp. ____ (S.D. Ohio May 8, 1973).	300.50
<i>Whitley v. Wilson City Board of Education</i> , 457 F.2d 940 (4th Cir. 1972)(en banc)	200.46
<i>Williams v. Hughes</i> , ____ F. Supp. ____ (No. DC 7076-S, N.D. Miss. Feb. 19, 1971).	100.06
<i>Williams v. Kimbrough</i> , 415 F.2d 874 (5th Cir. 1969), cert. denied, 396 U.S. 1061 (1970)	200.13
<i>Woolfolk v. Brown</i> , 358 F. Supp. 524 (E.D. Va. 1973).	500.12
<i>Wright v. County School Board of Greenville County, Virginia</i> , 252 F. Supp. 378 (E.D. Va. 1966).	200.16
<i>Wyatt v. Stickney</i> , 344 F. Supp. 387 (M.D. Ala. 1972).	300.17.
<i>Yablonski v. United Mine Workers</i> , ____ F.2d ____ (D.C. Cir. Aug. 3, 1972)	600.10
<i>Yarbrough v. Hulbert-West Memphis School District No. 4, of Crittenden County, Arkansas</i> , 243 F. Supp. 65 (E.D. Ark. 1965), vacated, 380 F.2d 962 (8th Cir. 1967).	200.20
<i>Yeomans v. Massey</i> , ____ F. Supp. ____ (N.D. Fla. Nov. 13, 1972). . .	300.34

INTRODUCTION

The past decade has seen an explosive growth of fee shifting in public interest litigation. As Congress passes statutes which depend for their enforcement on private citizens, and as courts realize the importance of citizen participation in judicial and administrative hearings, they have begun to adopt an attitude which permits private citizens real access to the courts by removing obstacles of cost. Realizing that a single citizen, or small group of citizens, will rarely have the tremendous amount of money necessary to stop violation of rights which Congress deems important, Congress and the courts have begun to recognize, even in cases where fees are not provided by statute, that the burden of enforcing national policy must be shifted from the victim to the violator, or must be borne by the public at-large.^{1/}

Federal courts have always had the equitable discretion to award attorneys' fees in the absence of specific statutory authorization, *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939), but prior to the late 1960's they did so only rarely. Attorneys' fees have traditionally been regarded as an appropriate punishment for those who litigate in bad faith by using dilatory tactics or raising specious defenses in their cases.^{2/} Apart from these cases, the most frequent awards

^{1/} For example, the first circuit recently stated that

"[t]he potential award of attorneys' fees [is] a logical complement to the right to bring citizen suits. . . . [T]he potential for an award would encourage citizens to bring meritorious actions. Without the possibility of fees many meritorious actions would never be brought, since the plaintiff would face a certainty of attorneys' fees far higher than any personal gain he would reap if victorious. With attorneys' fees, it would financially be possible for such actions to be brought." *Natural Resources Defense Council v. Environmental Protection Agency*, 484 F.2d 1331, at 1337 (1st Cir. 1973).

And the Senate Committee which included both the right of citizen suits and a provision for attorneys' fees in the Clean Air Act of 1970, 42 U.S.C. §§ 1857c-5 *et seq.*, realized that

"in bringing legitimate actions under this section citizens [are] performing a public service and in such instances the courts should award costs of litigation to such party." *S. Rep. No. 91-1196, 91st Cong., 2d Sess.* 38 (1970).

^{2/} See, e.g., Rules 30(g), 37, 56(g), Fed. R. Civ. P.; Rule 38, Fed. R. App. P.; and Rule 56(g), Sup. Ct. Rules.

- 2 -

of attorneys' fees prior to the 1960's came in those cases where there was a recovery for the benefit of a class; in these suits, fees were assessed from the "fund" created by the lawyers' successful efforts.^{3/} Attorneys' fees were awarded in early civil rights cases only when "obdurate obstinacy" existed.^{4/}

Between the Supreme Court's affirmance of equity courts' power to award fees in *Sprague*, *supra*, and the Court's 1967 decision in *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967), courts increasingly awarded attorneys' fees in commercial suits, especially with the enactment of many statutes either authorizing a discretionary award of fees or making such an award mandatory in specified types of cases. See Appendix A, *infra*. The Court's decision in *Fleischmann*, *supra*, temporarily halted this advance, as lower courts read the decision to mean that fees should not be awarded in the absence of specific statutory authorization.

In 1970, however, the Supreme Court once again ruled on attorneys' fees, in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970). There the Court ordered fees paid to plaintiffs who proved the use of misleading proxy statements in violation of the Securities Exchange Act. The *Mills* decision was based on a theory of "corporate therapeutics" -- because the lawsuit benefited the corporation being sued (by securing compliance with the law), the corporation, and not the plaintiff, should pay for the benefit, even though the benefit might never be financial. The *Fleischmann* case was distinguished as a case in which the creation of a detailed statutory scheme providing specific remedies for trademark violations showed Congress' intent to limit judicial discretion in fashioning additional remedies. The Court rejected the claim that specific authorization of fees in other sections of the Securities Exchange Act indicated Congressional intent to bar recovery of fees in suits brought under those portions of the Act which were silent as to attorneys' fees.^{5/}

The opening up of rules governing fee shifting in commercial cases has been closely paralleled by the broadening of attorneys' fees awards in public in-

^{3/} See, e.g., *Trustees v. Greenough*, 108 U.S. 527 (1882). Cf. *City of Philadelphia v. Charles Pfizer & Co.*, 345 F. Supp. 454 (S.D.N.Y. 1972).

Although the "fund theory" naturally arose chiefly in commercial cases, it was also applied in consumer actions. See, e.g., *Bebchick v. Public Utilities Comm'n*, 318 F.2d 187 (D.C. Cir. 1963); *Washington Gas Light Co. v. Baker*, 195 F.2d 29 (D.C. Cir. 1951).

^{4/} *Bradley v. School Board of the City of Richmond, Virginia*, 345 F.2d 310 (4th Cir. 1965) (*en banc*).

^{5/} See also *Yablonski v. United Mine Workers*, 466 F.2d 424, 428-29 (D.C. Cir. 1972), which makes it abundantly clear that fees are not barred in cases which are brought under a section of an act which does not specify attorneys' fees as an available remedy even though fees are specified as a remedy in other portions of the same act. See also *Hall v. Cole*, 412 U.S. 1 (1973).

- 3 -

terest cases. Passage of the 1964 Civil Rights Act, which allowed attorneys' fees in cases proving discrimination in employment (Title VII)^{6/} and public accommodations (Title II),^{7/} signalled the end of exclusive reliance on the negative punishment rationale in public interest cases. The shift to an increasingly broad and positive rationale for awarding fees was not widespread, however, until 1968. In that year, the Supreme Court held that

"When a plaintiff brings an action under . . . Title [II], he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. . . ." *Newman v. Piggie Park Enterprises*, 390 U.S. 400, at 402 (1968).

The "discretionary" award of attorneys' fees specified in Title II was therefore held to be automatic, "unless special circumstances would render such an award unjust." *Ibid.*^{8/} Thereafter, the Supreme Court also made it clear that "[t]he existence of a statutory right implies the existence of all necessary and appropriate remedies,"^{9/} and that courts should "interweave . . . new legislative policies with the inherited body of common-law principles . . ."^{10/}

Drawing the statutory analogy suggested by the Supreme Court's holdings, lower courts began to award fees in cases involving statutes which set broad national policies but were silent as to attorneys' fees. The most common awards were made under the Reconstruction civil rights statutes, 42 U.S.C. §§ 1981, 1982 and 1983 --

^{6/} 42 U.S.C. § 2000e-5k.

^{7/} 42 U.S.C. § 2000a-3(b).

^{8/} All statutes allowing a "discretionary" award of attorneys' fees in civil rights cases (Titles II and VII of the Civil Rights Act of 1964, the Fair Housing Act of 1968, 42 U.S.C. § 3612(c), and § 718 of the Emergency School Aid Act of 1972, 20 U.S.C. § 1617) have been construed, since the Supreme Court's decision in *Newman*, to call for an award of fees as a matter of course. See, e.g., *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971) (Title VII); *Rogers v. Loether*, 312 F. Supp. 1008 (E.D. Wis. 1970) (Fair Housing Act); *Northcross v. Board of Education of the Memphis City Schools*, 412 U.S. 427 (1973) (20 U.S.C. § 1617).

^{9/} *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969).

^{10/} *Moragne v. States Marine Lines*, 398 U.S. 375, 392 (1970). See *Lee v. Southern Home Sites*, 444 F.2d 143 (5th Cir. 1971).

- 4 -

statutes which protected rights similar to those protected in the 1964 Civil Rights Act, and whose language specifically instructed the courts to "use that combination of federal law, common law and state law as will be best adapted to the object of the civil rights laws."^{11/}

The rationale most commonly used by courts in awarding fees in suits brought under statutes which are silent as to attorneys' fees is an adaptation of the Supreme Court's *Mills* and *Newman* rationales, and has been variously called the "private attorney general," the "common benefit," and the "legal therapeutics" rationale. Briefly stated, courts have said that, when a private party brings suit to enforce the law, he is acting as a *private attorney general*, engaging in *legal therapeutics* by forcing compliance with the law, and thereby providing a *common benefit* for the public. The theory, no matter what its label, is basically a "full and appropriate relief" rationale: attorneys' fees are not just an equitable remedy in cases to enforce Congressional mandates; they are a *necessary* one, without which private citizens simply cannot pursue the rights Congress has promised them.^{12/}

These rationales have been applied in an increasing number and breadth of cases in the past several years, including decisions in virtually every circuit. The range of cases in which fees have been awarded under one or more of these related rationales includes: cases involving allegations of police brutality, false arrest and unreasonable search; suits seeking reform of state hospitals, prisons, and other state institutions; jury desegregation cases; teacher and other employment dismissal suits; first amendment cases; environmental actions; reapportionment cases; and labor union democracy and fair representation cases.

^{11/} *Brown v. City of Meridian, Mississippi*, 356 F.2d 602, 605 (5th Cir. 1966).
See 42 U.S.C. § 1988; *Lefton v. City of Hattiesburg, Mississippi*, 333 F.2d 280 (5th Cir. 1964).

Federal courts have, indeed, brought state laws governing attorneys' fees awards to bear in cases before them. *See, e.g., Stafford v. Southern Farm Bureau Casualty Insurance Co.*, 457 F.2d 366 (8th Cir. 1972); *Iowa National Mutual Insurance Co. v. City of Osawatomie, Kansas*, 458 F.2d 1124 (10th Cir. 1972).

^{12/} "If, pursuant to [an] action, plaintiffs have benefitted their class and have effectuated a strong congressional policy, they are entitled to attorneys' fees regardless of defendants' good or bad faith. Indeed, under such circumstances, the award loses much of its discretionary character and becomes part of the effective remedy a court should fashion to encourage public-minded suits and to carry out congressional policy." *Sims v. Amos*, 340 F. Supp. 691, at 694 (M.D. Ala. 1972) (three-judge court) [Citations omitted].

See n. 1, *supra*.

- 5 -

Because of the great variety and number of cases involving attorneys' fees, a new body of law is arising to answer the questions most frequently asked: against whom should fees be assessed; to whom should they be paid; who is a "prevailing party" for purposes of an award; and, perhaps most important, how should the size of fees be set? The rules of different courts are so disparate that few of these questions have been settled, especially since most courts seem to adapt the remedy to the particular case. But some lines have begun to emerge.

Courts have held that attorneys' fees can be awarded even if plaintiffs' counsel are salaried employees of civil-rights organizations^{13/} or of federally funded legal aid groups,^{14/} and even if there is no agreement between the attorney and his clients that a fee should be paid.^{15/} Except for one case,^{16/} courts have generally not been deterred from awarding fees against public defendants, such as school boards^{17/}, or even state officials^{18/} or state bodies.^{19/} While the federal government is specifically immune from assessment of attorneys' fees^{20/} except in the presence of a statutory waiver,^{21/} courts have been willing to construe statutes broadly to imply such a waiver.^{22/} In many cases the federal government

^{13/} *E.g.*, Clark v. American Marine Corp., 320 F. Supp. 709 (E.D. La. 1970); Sanders v. Russell, 401 F.2d 241 (5th Cir. 1970); La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972); Natural Resources Defense Council v. Environmental Protection Agency, 484 F.2d 1331 (1st Cir. 1973).

^{14/} *E.g.*, Incarcerated Men of Allen County v. Fair, ____ F. Supp. ____ (N.D. Ohio Oct. 5, 1973); Ferrigno v. Ferrigno, 279 A.2d 141 (N.J. 1971).

^{15/} *E.g.*, Lea v. Cone Mills Corp., 438 F.2d 86 (4th Cir. 1971); Miller v. Amusement Enterprises, Inc., 426 F.2d 534 (5th Cir. 1970).

^{16/} Sincock v. Obara, 320 F. Supp. 1098 (D. Del. 1970).

^{17/} *E.g.*, Bell v. School Board of Powhatan County, Virginia, 321 F.2d 494 (4th Cir. 1963) (*en banc*).

^{18/} *E.g.*, NAACP v. Allen, 340 F. Supp. 703 (M.D. Ala. 1972); Sims v. Amos, 340 F. Supp. 691 (M.D. Ala. 1972) (three-judge court), *aff'd*, 409 U.S. 942 (1972).

^{19/} *E.g.*, Griffin v. County School Board of Prince Edward County, Virginia, 363 F.2d 206 (4th Cir. 1966) (*en banc*) (State Board of Education); Gates v. Collier, ____ F.2d ____ (5th Cir. Dec. 5, 1973) (State Penitentiary Board).

^{20/} See 28 U.S.C. § 2412.

^{21/} *E.g.*, 1972 amendments to Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-16(d).

^{22/} *E.g.*, Pyramid Lake Paiute Tribe of Indians v. Morton, ____ F. Supp. ____ (D.D.C.

[Footnote Continued]

is not the only defendant; in those cases courts will assess fees against the other defendants.^{23/}

Many statutes specify that fees are to be awarded to the prevailing party. Courts have been willing to expand the definition of "prevailing party" when equity seemed to demand it: courts have, for example, awarded fees where a case is settled without going to trial, and the parties enter into a consent decree resolving the merits (even where there is no consent to the award of attorneys' fees).^{24/} In some cases, fees have been awarded where relief was gained without even filing a lawsuit,^{25/} or where a plaintiff's suit gains no relief, but causes the filing of other suits which subsequently recover funds.^{26/} In some cases plaintiffs are compensated by an award of fees even where they undeniably lose the case, on the theory that these plaintiffs brought to the court's attention issues which were of vital

[Footnote Continued]

June 22, 1973)(25 U.S.C. §§ 175, 476); *Adams v. Richardson*, 356 F. Supp. 92 (D.D.C. 1973), *modified & aff'd*, 480 F.2d 1159 (D.C. Cir. June 12, 1973)(*en banc*). In the recent case of *Natural Resources Defense Council v. Environmental Protection Agency*, 484 F.2d 1331 (1st Cir. 1973), the first circuit noted that "[t]he history of [28 U.S.C.] § 2412 reflects . . . a strong movement by Congress toward placing the federal government and civil litigants on a completely equal footing," for, while § 2412 originally exempted the United States from assessment of both costs and attorneys' fees, it was amended in 1966 to make the United States liable for costs. The court theorized that Congress' failure simply to repeal § 2412 in 1966, rather than merely to amend it, was a reflection of the *Fleischmann*-era disfavor of fee shifting, although the lack of availability of attorneys' fees would seem "inconsistent with the express desire to eliminate the 'unfair' advantage possessed by the United States by virtue of its sovereign immunity."

^{23/} *E.g.*, *-La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972); *Sierra Club v. Lynn*, ____ F. Supp. ____ (W.D. Texas May 21, 1973).

^{24/} *E.g.*, *Incarcerated Men of Allen County v. Fair*, ____ F. Supp. ____ (N.D. Ohio Oct. 5, 1973); *Blumenthal v. Lee Memorial Hospital*, ____ F. Supp. ____ (E.D. Ark. Aug. 1, 1971); *London v. East Feliciana Parish Police Jury*, ____ F. Supp. ____ (E.D. La. May 16, 1972); *Cunningham v. Board of Education of Benton School District No. 8, Benton, Arkansas*, ____ F. Supp. ____ (E.D. Ark. Sept. 11, 1969).

^{25/} *E.g.*, *Blau v. Rayette-Faberge*, 389 F.2d 469 (2d Cir. 1968); *Gilson v. Chock Full O'Nuts Corp.*, 326 F.2d 246 (2d Cir. 1964); *Dottenheim v. Emerson Elec. Mfg. Co.*, 7 F.R.D. 195 (E.D.N.Y. 1947), all awards for discovery of short-swing profits.

^{26/} *E.g.*, *Thomas v. Honeybrook Mines, Inc.*, 428 F.2d 981 (3d Cir. 1970), *cert. denied*, 401 U.S. 911 (1971), *on remand*, ____ F. Supp. ____ (M.D. Pa. April 18, 1973).

- 7 -

importance.^{27/} It is also fairly well settled that a plaintiff need not prevail on all issues in order to be considered a "prevailing party" for purposes of a fee award,^{28/} largely because courts are often loathe to deny fees if part of a suit fails lest this cause conservatism on the part of lawyers and important but unproved theories are not given their day in court.^{29/} On the other hand, some courts have refused to award fees to a prevailing corporate defendant (even where the statute allows fees to any prevailing party) on the ground that such an award would not be in keeping with a statutory policy of promoting good-faith litigation.^{30/}

Courts are normally hesitant to award attorneys' fees prior to completion of a case, but interim awards have been made.^{31/} Awards are also made by a lower court where an appeal is pending,^{32/} although the court will often make the award and stay execution pending appeal.^{33/}

^{27/} *E.g.*, Hargrove v. Caddo Parish School Board, ____ F. Supp. ____ (W.D. La. June 13, 1972); Sierra Club v. Lynn, ____ F. Supp. ____ (W.D. Texas May 21, 1973). *See also* McEnteggart v. Cataldo, 451 F.2d 1109 (1st Cir. 1971), where fees were awarded losing plaintiff on another ground.

^{28/} In many Title VII cases, for instance, plaintiffs were able to prove discrimination, but because of unilateral action taken by the defendant were unable to obtain an injunction. Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970); Richards v. Griffith Rubber Mills, 300 F. Supp. 338 (D. Ore. 1969); Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377 (4th Cir. 1972).

^{29/} *E.g.*, Natural Resources Defense Council v. Environmental Protection Agency, 484 F.2d 1331 (1st Cir. 1973).

^{30/} *E.g.*, Richardson v. Hotel Corporation of America, 332 F. Supp. 519 (E.D. La. 1971). *But see* United States v. Gray, 319 F. Supp. 871 (D.R.I. 1970), a case in which the United States brought a Title II action against an allegedly discriminating motel, lost, and was ordered to pay fees. *Compare* the many statutes cited in Appendix A which authorize fees only for prevailing plaintiffs or, in some cases, only for prevailing defendants.

^{31/} *E.g.*, Highway Truck Drivers and Helpers Local 107 v. Cohen, 220 F. Supp. 735 (E.D. Pa. 1963); United States Steel Corporation v. United Mine Workers of America, 79 L.R.R.M. 2518 (3d Cir. 1972).

^{32/} *E.g.*, Sims v. Amos, 340 F. Supp. 691 (M.D. Ala. 1972) (three-judge court), *aff'd*, 409 U.S. 942 (1972).

^{33/} An especially interesting case is Blankenship v. Boyle, 79 L.R.R.M. 2183 (D. D.C. 1972), where the judge stated that he would entertain a motion for a stay of judgment pending appeal, so long as it was understood that six percent simple interest would run during the stay.

One of the principal difficulties in *pro bono* cases has been the small size of the fees. More courts are beginning to recognize that, because "in many cases . . . the possibility of recovering attorney's fees will provide the sole stimulus for the enforcement of [the law] . . ." the allowance must not be too niggardly," ^{34/} but others persist in making awards which are insultingly low. The greatest advances have been made in Title VII cases and union cases, where there has recently been a tendency to award fees which truly compensate lawyers for the time they spend, at fair hourly rates.^{35/} In other *pro bono* cases the rationale behind the low fees is often a stated desire to see that attorneys do not "get rich" by filing public interest suits,^{36/} and an unstated feeling on the part of some courts that public interest cases are somehow less worthy than commercial suits or suits involving damages or property rights. Some courts have drawn analogies to criminal cases, in fact, and have set fees in *pro bono* cases at the rate paid court-appointed counsel under the Criminal Justice Act.^{37/}

The more recent cases which have discussed the size of fees in *pro bono* litigation have generally held that the size of the award is, or should be, governed by substantially the same considerations which govern commercial awards: the complexity of the case and the difficulty of the proof; the likelihood of success; the expertise and thoroughness of the attorneys seeking the award; the time required to prepare and try the case; and the degree of success achieved. In *pro bono* cases, courts often also weigh: the benefit derived by the public; the hardships which bringing and maintaining the suit have brought upon litigants and their attorneys; the responsibility of representing an entire class rather than specific plaintiffs (although attorneys' fees are awarded in cases which are not maintainable as class actions)^{38/}; and, less frequently, the size of the fees paid

^{34/} *Smolowe v. Delendo Corp.*, 136 F.2d 231, at 241 (2d Cir. 1943), *cert. denied*, 320 U.S. 751 (1943).

^{35/} *E.g.*, *Rosenfeld v. Southern Pacific Co.*, 4 FEP Cases 72 (C.D. Cal. 1971) (\$73 per hour, Title VII); *Blankenship v. Boyle*, 79 L.R.R.M. 2183 (D.D.C. 1972) (\$55-plus per hour, union breach of fiduciary obligations case).

^{36/} *E.g.*, *Wyatt v. Stickney*, 344 F. Supp. 387 (M.D. Ala. 1972); *Newman v. Alabama*, 349 F. Supp. 278 (M.D. Ala. 1972); *Beckett v. School Board of the City of Norfolk, Virginia*, No. 2214 (E.D. Va. Jan. 22, 1973).

^{37/} Cases listed *supra*, note 36.

^{38/} *E.g.*, *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939); *Gibbs v. Blackwelder*, 346 F.2d 943 (4th Cir. 1965); *Ratner v. Chemical Bank New York Trust Co.*, 54 F.R.D. 412 (S.D.N.Y. 1972).

by the opposing side.^{39/} In cases where damages are awarded, courts often take the amount of damages into consideration in awarding attorneys' fees,^{40/} but in other cases have awarded fees far in excess of damages,^{41/} and have even awarded fees where damages were sought but not awarded.^{42/}

The lawyer's regular hourly rate or his fee arrangement with his client is ordinarily the starting point in determining a reasonable attorneys' fee,^{43/} and the rate may be increased or decreased because of the presence or absence of any of the above factors.^{44/} It is clear that the trial court should "follow proper standards" in assessing fees, whether there is an evidentiary hearing or not,

^{39/} *E.g.*, *Bradley v. School Board of the City of Richmond, Virginia*, 53 F.R.D. 28 (E.D. Va. 1971); *Beckett v. School Board of the City of Norfolk, Virginia*, ____ F. Supp. ____ (E.D. Va. Jan. 22, 1973).

In an early school desegregation case, however, plaintiffs' counsel were awarded \$19,000 for the same period of time for which the defendants' counsel were paid approximately \$150,000. *Griffin v. County School Board of Prince Edward County, Virginia*, 363 F.2d 206 (4th Cir. 1968) (*en banc*), *cert. denied*, 385 U.S. 960 (1966).

Some courts have used a "disparate resources" rationale as a partial basis for awarding fees, reasoning that, absent an award of fees, the relative financial position of a private plaintiff and a state or corporate defendant would prevent the plaintiff from bringing suit to remedy a violation of his rights. *See, e.g.*, *Donahue v. Staunton*, 471 F.2d 475 (7th Cir. 1972); *Pyramid Lake Paiute Tribe of Indians v. Morton*, ____ F. Supp. ____ (D.D.C. June 22, 1973).

^{40/} *E.g.*, *Bates v. Hinds*, ____ F. Supp. ____ (N.D. Texas Nov. 9, 1971); *Brown v. Ballas*, 331 F. Supp. 1033 (N.D. Texas 1971).

^{41/} *E.g.*, *Hill v. Franklin County Board of Education*, 390 F.2d 583 (6th Cir. 1968); *James v. Beaufort County Board of Education*, ____ F. Supp. ____ (E.D.N.C. Nov. 11, 1971); *Ratner v. Chemical Bank New York Trust Co.*, 54 F.R.D. 412 (S.D.N.Y. 1972).

^{42/} *E.g.*, *Hammond v. Housing Authority & Urban Renewal Agency of Lane County*, 328 F. Supp. 586 (D. Ore. 1971); *Hegler v. Board of Education of the Bearden School District, Bearden, Arkansas*, 447 F.2d 1078 (8th Cir. 1971).

^{43/} *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, ____ F.2d ____ (3d Cir. Oct. 31, 1973). *See also* *McKittrick v. Gardner*, 378 F.2d 872 (4th Cir. 1967).

^{44/} *E.g.*, *United States v. Gray*, 319 F. Supp. 871 (D.R.I. 1970); *Blankenship v. Boyle*, 79 L.R.R.M. 2183 (D.D.C. 1972).

- 10 -

and specify the standards used in making an award, so that review is possible.^{45/} In fact, courts of appeals have been increasingly willing to review a trial court's determinations regarding attorneys' fees by ruling, for example, that district courts abused their discretion in denying attorneys' fees,^{46/} or in awarding too small an attorneys' fee.^{47/} Courts of appeals have also awarded attorneys' fees themselves for processing an appeal.^{48/}

* * *

The past decade has seen real progress toward making attorneys' fees a common element of full and appropriate relief in public interest cases. Courts have been willing to expand the concept to new areas of the law, and have been more interested, at least in some cases, in equity than in formalities. Congress, too, has spurred the movement, by passing more statutes authorizing attorneys' fees. Since passage of the 1964 Civil Rights Act, Congress has specified attorneys' fees as an available remedy in, among others, housing discrimination cases,^{49/} school desegregation cases,^{50/} and some environmental actions^{51/} and consumer protection cases.^{52/} The Executive Branch has also been active in seeking an expansion of the concept of attorneys' fees in public interest litigation, largely by filing *amicus curiae* briefs in several significant cases.^{53/}

^{45/} *Lindy Brothers Builders, supra*, note 44; *Ellis v. Flying Tiger Corp.*, ____ F.2d ____ (7th Cir. Oct. 27, 1972).

^{46/} *E.g.*, *Bell v. School Board of Powhatan County, Virginia*, 321 F.2d 494 (4th Cir. 1963)(*en banc*); *Nesbit v. Statesville City Board of Education*, 418 F.2d 1040 (4th Cir. 1969)(*en banc*); *Knight v. Auciello*, 453 F.2d 852 (1st Cir. 1972).

^{47/} *E.g.*, *Griffin v. County School Board of Prince Edward County, Virginia*, 363 F.2d 206 (4th Cir. 1966)(*en banc*), *cert. denied*, 385 U.S. 960 (1966); *Monaghan v. Hill*, 140 F.2d 31 (9th Cir. 1944).

^{48/} *E.g.*, *Clark v. Board of Education of the Little Rock School District*, 449 F.2d 493 (8th Cir. 1971)(*en banc*).

^{49/} Fair Housing Act of 1968, 42 U.S.C. § 3612(c).

^{50/} Emergency School Aid Act of 1972, 20 U.S.C. § 1617.

^{51/} Clean Air Act, 42 U.S.C. § 1857h-2(d).

^{52/} Truth-in-Lending Act, 15 U.S.C. § 1640.

^{53/} *E.g.*, *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Office of Communications of the United Church of Christ v. Federal Communications Commission*, ____ F.2d ____ (D.C. Cir. March 28, 1972); *Wyatt v. Stickney*, 344 F. Supp. 387 (M.D. Ala. 1972); and, most recently, *Bradley v. School Board of the City of Richmond, Virginia*, now pending in the Supreme Court.

- 11 -

The Supreme Court has also recently bolstered the concept. In *Northercross v. Board of Education of the Memphis City Schools*, 412 U.S. 427 (1973), the Court held that section 718 of the Emergency School Aid Act of 1972, 20 U.S.C. § 1617, which provides for awards of attorneys' fees in cases proving discrimination in schools, was the type of statute under which fee awards should be virtually automatic, absent special circumstances. In *Hall v. Cole*, 412 U.S. 1 (1973), a union bill of rights case, the Court affirmed an award of attorneys' fees absent statutory authorization in a well reasoned 6-to-2 opinion by Mr. Justice Brennan. The affirmance was based on a "common benefit," and the Court specifically refused to rule on the "private attorney general" theory, leaving that question open for decision in *Bradley v. School Board of the City of Richmond, Virginia*, No. 72-1322, 54/ a case argued in the Supreme Court on December 5, 1973.

The concept of fee shifting in public interest cases is now at a watershed. Some courts and defendants are now seeking, and sometimes finding, various ingenious ways to escape the full impact of the attorneys' fees trend, 55/ and recent months have seen a good deal of backtracking. Many lower courts are postponing

54/ 53 F.R.D. 28 (E.D. Va. 1971), *rev'd*, 472 F.2d 318 (4th Cir. 1972) (*en banc*).

55/ By far the most common device is an award of ridiculously low fees. Harper v. Mayor & City Council of Baltimore, Maryland, 5 FEP Cases 1050 (D. Md. 1973) (\$15-plus per hour in a suit proving discrimination in a city fire department). Some courts refuse to award attorneys' fees to counsel employed in OEO Legal Services Programs, *Pickens v. Okolona Municipal Separate School District*, No. EC6956 (N.D. Miss. Aug. 11, 1971); *Ross v. Goshi*, 351 F. Supp. 949 (D. Hawaii 1972), or reduce the amount of fees to counsel who are salaried employees of public interest, foundation-funded law groups. *Fairly v. Patterson*, ____ F. Supp. ____ (S.D. Miss. Feb. 20, 1973); *Gates v. Collier*, ____ F. Supp. ____ (N.D. Miss. Feb. 14, 1973); *Burt v. Edgefield County Board of Education*, ____ F. Supp. ____ (D.S.C. Oct. 11, 1973). But see *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972), and the cases at notes 11-13, *supra*. The State of Ohio has recently revived the eleventh amendment immunity argument in three cases which are now before the sixth circuit: *Taylor v. Perini*, No. C69-275 (N.D. Ohio May 23, 1973); *Jordan v. Mahoning County Board of Elections*, No. C-71-1130-Y (N.D. Ohio May 19, 1972); and *Welch v. Rhodes*, No. 69-249 (S.D. Ohio May 23, 1973). But the State of Alabama also raised the eleventh amendment argument in its jurisdictional statement to the Supreme Court in *Sims v. Amos*, and the Supreme Court nonetheless summarily affirmed the award. 409 U.S. 942 (1972). See also *Gates v. Collier*, ____ F.2d ____ (5th Cir. Dec. 5, 1973). Both the fourth and fifth circuits have recently written opinions which seem to signal a return to the punishment rationale: *McLaurin v. Columbia Municipal Separate School District*, 478 F.2d 348 (5th Cir. 1973), *Bradley v. School Board of the City of Richmond, Virginia*, 472 F.2d 318 (4th Cir. 1972) (*en banc*).

- 12 -

decisions in the area pending the Supreme Court's decision in *Bradley*. Still other judges in the lower courts, seemingly unaware that their brethren elsewhere are either catching their breath or peddling full speed backward, continue to award attorneys' fees where equity demands it.

* * *

The law has always provided encouragement for protection of property rights -- for example by statutes providing for treble damages and attorneys' fees in commercial cases. The more intangible personal rights have been both more elusive and less protected, but the cases in this memorandum show that courts are increasingly recognizing the need to encourage aggrieved parties to pursue adherence to the law on a broad scale, and are recognizing the critical role of attorneys' fees in this process.^{56/}

- Mary Frances Derfner

^{56/} Some particularly useful pieces on attorneys' fees are the following:

- P. Nussbaum, *Attorneys' Fees in Public Interest Litigation*, 48 N.Y.U. L. Rev. 301 (1973);
- Note: *Awarding Attorneys' Fees to the "Private Attorney General": Judicial Green Light to Private Litigation in the Public Interest*, 24 *Hast. L.J.* 733 (1973);
- *Allowance of Attorney Fees in Civil Rights Actions*, 7 *Colum. J.L. & Soc. Probs.* 381 (1971);
- Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 *Calif. L. Rev.* 792 (1966);
- *The Allocation of Attorneys' Fees After Mills v. Electric Auto-Lite Co.*, 38 *U. Chi. L. Rev.* 316 (1971);
- Note: *Awarding Attorney and Expert Witness Fees in Environmental Litigation*, 58 *Cornell L. Rev.* 1222 (1973);
- Note: *Attorneys' Fees: Where Shall the Ultimate Burden Lie?*, 20 *Vand. L. Rev.* 1216 (1967);
- Stoebuck, *Counsel Fees Included in Costs: A Logical Development*, 38 *U. Colo. L. Rev.* 202 (1966);
- Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?*, 49 *Iowa L. Rev.* 75 (1963);
- Hornstein, *Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards*, 69 *Harv. L. Rev.* 658 (1956);
- McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 *Minn. L. Rev.* 619 (1931);
- Note: *Awarding of Attorneys' Fees in School Desegregation Cases: Demise of the Bad-Faith Standard*, 39 *Brooklyn L. Rev.* 370 (1972); and
- McLaughlin, *The Recovery of Attorney's Fees: A New Method of Financing Legal Services*, 40 *Fordham L. Rev.* 761 (1972).

- 13 -

Series 100 of this memorandum deals with reapportionment cases -- some alleging racial discrimination and some alleging only a violation of the one man, one vote concept. Recently courts have stated that the discretion to deny fees to a successful plaintiff in reapportionment suits is to be exercised only rarely.

Series 200 of this memorandum deals with school cases -- desegregation, teacher and student dismissal suits. Prior to passage of § 718 of the Emergency School Aid Act of 1972, 20 U.S.C. § 1617, this was the type of case in which non-statutory fees were most frequently awarded. While most cases in the series are nonstatutory cases brought under 42 U.S.C. § 1983, some have become statutory cases since the passage of § 718.

Series 300 of this memorandum deals with various cases under the Civil Rights Acts of 1866 to 1871, 42 U.S.C. §§ 1981, 1982 and 1983, alleging racial discrimination and deprivation of individual rights in various situations. Many of these cases are similar to cases brought under the 1964 Civil Rights Act, but statutory authority for attorneys' fees awards in the cases does not exist.

Series 400 deals with awards of fees which are authorized by statute. Because it is now clear that such awards under Title II and Title VII of the Civil Rights Act of 1964 and under the Fair Housing Act of 1968 and the Emergency School Aid Act of 1972 are almost automatic, the memorandum includes only a few statutory cases -- those which make points that have been, or might be, construed as valid and/or helpful in nonstatutory cases.

Series 500 includes landmark Supreme Court decisions regarding attorneys' fees, as well as some few cases which have general application and some environmental cases.

Series 600 deals with labor cases, some of which award fees without express statutory authorization on an application of the fund theory or the benefit theory, or under broad interpretations of the term "appropriate relief," and some of which, although awards are based on specific statutory authorization, contain helpful language.

100.01 - *Dyer v. Love*, 307 F. Supp. 974 (N.D. Miss. 1969)

A. Civil Action No. GC 6452-S

B. Counsel for Plaintiffs: Philip Mansour (Greenville, Miss.), Martin Kilpatrick (Greenville, Miss.)

Counsel for Defendants: Edward J. Bogen, J. A. Lake, George H. Slade (Greenville, Miss.)

C. Opinion, Smith, J., December 30, 1969

Suit to reapportion Washington County, Mississippi, on one man, one vote grounds.

Although defendants "vigorously" oppose the allowance of attorneys' fees, such fees are granted.

(1) Plaintiffs, or others, had filed a petition to redistrict, under Miss. Code § 2870, but the Board had refused;

(2) Plaintiffs had no express agreement with their lawyers to pay a fee, but the lawyers did not expressly agree to perform without a fee -- this factor basically treated as irrelevant either way;

(3) Plaintiffs' attorneys have performed many duties in connection with this suit;

(4) "the allowance of an attorney fee is within the sound discretion of the Court, to be exercised on the peculiar facts of each case"; and

(5) Defendants' argument that they have not been "arbitrary or defiant" is specious: "the bringing of this action was made necessary by the board of supervisors' unreasonable and obstinate refusal to redistrict itself," and the awarding of fees is therefore warranted by the rule of *Bradley v. School Board of the City of Richmond*, 345 F.2d 310 (4th Cir. 1965). */

On March 17, 1970, the district court adopted the plan submitted by the defendants (noting that the plaintiffs had no objection), and fixed the attorneys' fees at \$10,000, to be taxed as costs against the defendants.

*/ ". . . Attorneys' fees are appropriate only when it is found that the bringing of the action should have been unnecessary and was compelled by the school board's unreasonable, obdurate obstinacy." 345 F.2d at 321.

100.02 - *Martinolich v. Dean*, 256 F. Supp. 612 (S.D. Miss. 1966)
(three-judge court)

- A. Civil Action No. 3111
- B. Counsel for Plaintiffs: Upton Sisson (Gulfport, Miss.)
Counsel for Defendants: Gex, Gex & Phillips (Bay St. Louis, Miss.), George Morse (Gulfport, Miss.)
- C. Coleman, Clayton & Cox, JJ.
- D. Opinion, Per Curiam, July 27, 1966

Class action to redistrict Hancock County, Mississippi, on one man, one vote grounds. State trial court had denied relief on the ground that no petition to redistrict had been filed under Miss. Code § 2870; the Mississippi Supreme Court affirmed; the United States Supreme Court refused to accept jurisdiction. *Glass v. Hancock County Election Commission*, 156 So. 2d 825 (1963), *app. dismissed & cert. denied*, 378 U.S. 558 (1964).

Opinion requires Board to submit plan, permits response from plaintiffs, calls for briefs from both sides on the questions of (1) whether it is proper in this case to award attorneys' fees; and (2) if so, in what amount -- and reserves decision as to fees until a later date.

An order issued by Cox, J., on June 14, 1967, taxed attorneys' fees against the Board in the amount of \$5,000.

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Martinolich v. Dean, ____ F. Supp. ____ (S.D. Miss. April 4, 1972)

On motion to assess an amount in addition to the \$5,000 awarded plaintiffs' counsel on June 14, 1967, the court awarded an additional \$1,000, stating that it was

"not impressed to any great extent with the propriety of any order for an additional allowance, but has carefully examined and considered this record and the vast amount of legal services which have been rendered by these plaintiffs in undertaking to have presented to the Court ultimately a fair and reasonable and acceptable plan for the redistricting of this county.

"It must be noted in all fairness that some change was made during this litigation in the guidelines and requirements laid down by the Court for a proper redistricting

[Continued]

100.02 (Cont'd)

of a county. That fact in large measure has contributed to the necessity for additional services herein. Under all of the facts and circumstances and reasonable inferences, it is the considered opinion of this Court that an additional attorneys fee should be awarded the plaintiffs herein for the services rendered them . . . and that a fair and reasonable additional allowance therefor as costs herein would be the further sum of \$1,000.00 . . . which shall be assessed against the Board of Supervisors of Hancock County, Mississippi, to be paid out of the public funds of said county"

100.03 - *Danon v. Lauderdale County Board of Supervisors*, 254 F. Supp. 918 (S.D. Miss. 1966)(three-judge court)

A. Civil Action No. 1197

B. Counsel for Plaintiffs: R. B. Deen, Lawrence W. Rabb
(Meridian, Miss.), Upton
Sisson (Gulfport, Miss.)

Counsel for Defendants: Joe T. Patterson, Will Wells
(Jackson, Miss.), Gipson &
Gipson (Meridian, Miss.)

C. Coleman, Cox & Russell, JJ.

D. Opinion, Per Curiam, March 30, 1966

Original suit brought to enjoin the holding of malapportioned elections and to compel the redistricting of beats in Lauderdale County, Mississippi.

This case asks that reasonable attorneys' fees be taxed as costs against defendants. Although redistricting was "accomplished solely as a result of this action," and "[t]here was a great need for such redistricting," and although there had been a "past reluctance of the board to do its duty in this respect," motion for attorneys' fees is denied.

(1) The record indicates no fraud or vindictiveness on the part of defendants;

(2) Plaintiffs had no express contract with their attorney to pay a fee;

(3) Plaintiffs failed to exhaust administrative remedies and submit, prior to suit, a petition to the Board (Miss. Code § 2870);

(4) "The assessment of cost is never made for punitive reasons"; and

(5) Injury to the plaintiffs, and benefit to the class, "is not clearly apparent."

100.04 - *Carpenter v. Toler*, ____ F. Supp. ____ (N.D. Miss. May 26, 1971)

A. No. GC 718-K

B. Counsel for Plaintiffs: Townsend & McWilliams (Drew, Miss.)
Counsel for Intervenor: Semmes Luckett (Clarksdale, Miss.)
Counsel for Defendants: Howard Q. Davis (Indianola, Miss.)

C. Judgment, Keady, J., May 26, 1971

Suit to redistrict Sunflower County, Mississippi. Because population deviations were so great, the Northern District of Mississippi, Keady, J., granted summary judgment for the plaintiffs, and directed the defendants to submit a valid apportionment plan. The defendants and intervenors submitted plans, the intervenors claiming that the defendants' plan was defective. The court adopted the defendants' plan, rejecting intervenors' plan and objections to the defendants' plan, but agreeing with the intervenors' claim concerning a population counting error in one part of the defendants' plan, and instructing the plaintiffs to recount and make any necessary adjustments.

Attorneys' fees were negotiated: "The Court having . . . found that defendants herein have agreed that it would be equitable and just for plaintiffs' attorney and the intervenors' attorney to be allowed a reasonable fee for their services, which fee has been agreed upon by the parties and fixed at \$2,500.00 each . . .", a total of \$5,000 was awarded.

100.05 - *Kitching v. Bobo*, ____ F. Supp. ____ (N.D. Miss. May 24, 1971)

A. No. DC 7082-K

B. Counsel for Plaintiffs: John L. Hatcher (Cleveland, Miss.)
Counsel for Defendants: John L. Pearson (Rosedale, Miss.)

C. Judgment, Keady, J., May 24, 1971

In a suit to redistrict Bolivar County, Mississippi, the Northern District of Mississippi, Keady, J., granted summary judgment for the plaintiffs because the population deviations were so great, and directed the defendants to submit a valid reapportionment plan. After a hearing at which the defendants testified about the manner in which the plan they then submitted had been prepared, the court adopted defendants' plan without objection from the plaintiffs.

Plaintiffs' counsel worked 93 hours on the case, which, at their usual office rate of \$35 per hour, totalled approximately \$3,350. The Court, "having found . . . that defendants herein have agreed that it would be equitable and just for plaintiff's attorney to be allowed a reasonable fee for his services plus expenses incurred herein, which is a fee of \$3,350.00 plus expenses of \$161.20 for a total of \$3,511.20," ordered that amount taxed against defendants.

100.06 - *Williams v. Hughes*, ____ F. Supp. ____ (N.D. Miss. Feb. 19, 1971)

A. No. DC 7076-S

B. Counsel for Plaintiffs: Semmes Luckett, Leon Porter,
Jr. (Clarksdale, Miss.)

Counsel for Defendants: Shed Hill Roberson (Clarks-
dale, Miss.)

C. Judgment, Smith, J., February 19, 1971

Suit to reapportion Coahoma County, Mississippi. Because the population deviations were so great, the Northern District of Mississippi, Smith, J., granted plaintiffs' motion for summary judgment, and required defendants to submit a valid reapportionment plan, which plan was put into effect by the court a month later.

Because "defendants have agreed that it would be equitable and just for plaintiffs' attorneys to be allowed a reasonable fee for their services herein, which they have also agreed should be the sum of \$2,500.00, to be taxed as part of the costs," the court awards plaintiffs attorneys' fees of \$2,500.

100.07 - *Sigalas v. Cumbest*, ____ F. Supp. ____ (S.D. Miss. Feb. 18, 1970)

A. Civil Action No. 3239

B. Counsel for Plaintiffs: Karl Wiesenburg (Pascagoula, Miss.), Upton Sisson (Gulfport, Miss.)

Counsel for Defendants: Carl Megehee (Pascagoula, Miss.), George Morse (Gulfport, Miss.)

C. Opinion, Russell, J., February 18, 1970

Suit filed in 1967 to redistrict Jackson County, Mississippi. The court allowed the existing districts to be kept, but ordered the 1967 elections for county supervisor to be held at-large.

In 1969, the Board of Supervisors adopted a new districting plan, and moved the court for approval under the court's retained jurisdiction. After a hearing at which the manner of drawing the new plan was considered, and plaintiffs offered neither objection nor an alternate plan, the court found that defendants' plan was constitutionally acceptable, and ordered it into effect.

"The Court also finds that the parties hereto have agreed on the sum of \$5,000.00 as plaintiff's attorney fees, which sum the Court finds fair and reasonable."

100.08 - *Scott v. Burkes*, ____ F. Supp. ____ (S.D. Miss. April 29, 1971)

A. Civil Action No. 4782

B. Counsel for Plaintiffs: A. R. Wright, Jr.
Counsel for Defendants: J.E. Smith, James G. McLemore

C. Opinion, Nixon, J., April 29, 1971

Suit to reapportion Leake County, Mississippi. The court ordered defendants to file a valid reapportionment plan, and thereafter adopted the plan submitted by defendants.

Upon approval of defendants' plan, the court ordered "that all court costs herein be and are assessed against the Defendants . . . and that A. R. Wright, Jr., Attorney for the Plaintiffs, be and he is hereby allowed a fee of Five Hundred . . . Dollars . . . for his services rendered in this cause and said Defendants . . . are hereby ordered to pay said fee upon submission of invoice by said attorney from general county funds of said county."

100.09 - *Sincock v. Obara*, 320 F. Supp. 1098 (D. Del. 1970) (three-judge court)

A. Civil Action No. 2470

B. Counsel for Plaintiffs: Vincent Theisen, John Mulford
(Wilmington, Del.)
Counsel for Defendants: Ruth M. Ferrell

C. Biggs, Wright & Layton, JJ.

D. Opinion, Biggs, J., December 29, 1970

In a suit seeking attorneys' fees for protracted and complex litigation which resulted in the reapportionment of the Delaware state legislature, in line with one man, one vote, the defendants' attorney did not oppose plaintiffs' application for attorneys' fees, but stated that the General Assembly had no funds with which to pay and could not be forced to pay because of its eleventh amendment sovereign immunity, so that application for appropriation of funds would have to be made to the legislature by the attorneys seeking compensation.

The State had appropriated in excess of \$200,000 to pay special counsel for defendants in this case. No one objected to the amounts sought by plaintiffs: \$224,000 in fees (4,784 hours), and \$4,376.16 in out-of-pocket expenses.

Attorneys undertook the case "on a partial-contingent fee basis," and would therefore be entitled to a higher fee than if they had worked for a fixed fee.

Attorneys followed the litigation through to a successful and "excellent" conclusion. Attorneys "rendered valuable services to the State of Delaware and to its citizens for which [they] should be adequately compensated."

Nonetheless, it is not within the power of the court to grant such fees, either against the State of Delaware or against the individual defendants in their official capacities. The court has been "unable to find any decision supported by a reasoned opinion which gives such a result [grant of a money judgment against a State or its employees]." [The court mistakenly distinguished school desegregation cases because it erroneously assumed that attorneys' fees in those cases are expressly authorized by statute.]

In the usual case, ". . . counsel fees will not be allowed in the absence of an authorizing statute." Even if the court were to apply *Mills v. Electric Auto-Lite, infra*, against whom would the judgment issue? The State cannot be ordered to pay fees by the court.

"There can be no doubt of the success of [the attorneys'] representation and we believe it to be a fact that reapportionment suits will not often be maintained by counsel

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100.09 [Cont'd]

working without compensation.

* * *

"We conclude that [the attorneys'] petition must be dismissed for want of jurisdiction. We reiterate, however, that [they have] done fine and spendid [*sic*] work for the State of Delaware and its citizens. In the context of this case, however, thanks and praise cannot be deemed to be too valuable considerations. We hope that [they] will be rewarded with just compensation by grace of the General Assembly."

100.10 - *Sinis v. Amos*, ____ F. Supp. ____ (M.D. Ala. March 17, 1972)
(three-judge court)

A. No. 1744-N

B. Counsel for Plaintiffs: Morris Dees, Joseph Levin
(Montgomery, Ala.), *et al.*

C. Opinion, Per Curiam, March 17, 1972, Rives, Thomas &
Johnson, JJ.

The court, on January 3, 1972, found the state legislature of Alabama malapportioned, and ordered into effect the single-member-district plan proposed by the plaintiffs. Upon the motion for attorneys' fees and the cost bill, the court awarded plaintiffs \$10,024.15 costs (which included the expenses of preparing plaintiffs' plan), \$3,235.55 clerk's costs, and \$14,822.50 attorneys' fees, to be taxed against defendants.

All parties agreed that \$14,822.50 was "a reasonable charge" if attorneys' fees were warranted. "This Court not only concurs in the reasonableness of the sum claimed by plaintiffs, but, under the circumstances, finds it to be modest."

Although defendants appealed the January 3 ruling, the court proceeded to consider plaintiffs' requests for costs and attorneys' fees, as ". . . it is all the more urgent that the costs be taxed and the entire action be determined so as to be reviewable on one appeal"

Defendants had pleaded that the absence of bad faith on their part precluded an award of attorneys' fees, but the court found that the legislature's failure to reapportion itself in light of clear need, and other defendants' submission of "obviously unacceptable plans," amounted to bad faith. Nonetheless, the court explicitly stated it was resting its award not on bad faith, but on the concept that the plaintiffs had acted as private attorneys general:

"Nevertheless, a finding of bad faith is not always a prerequisite to the taxing of attorneys' fees against defendants, and in this case, despite the availability of that ground, the Court has decided to base its award on far broader considerations of equity.

"In instituting the case *sub judice*, plaintiffs have served in the capacity of 'private attorneys general' seeking to enforce the rights of the class they represent. If, pursuant to this action, plaintiffs have benefited their class and have effectuated a strong congressional policy, they are entitled to attorneys' fees regardless of defendants' good or bad faith. Indeed, under such circumstances, the award loses much of its discretionary character and becomes a part of the effective remedy a

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100.10 (Cont'd)

court should fashion to encourage public-minded suits, and to carry out congressional policy.

"The present case clearly falls among those meant to be encouraged under the principles articulated in *Piggie Park Enterprises, Inc.* and *Mills*, and expanded upon in *Southern Home Sites* and *Bradley*. The benefit accruing to plaintiffs' class from the prosecution of this suit cannot be overemphasized. No other right is more basic to the integrity of our democratic society than is the right plaintiffs assert here to free and equal suffrage. In addition, congressional policy strongly favors the vindication of federal rights violated under color of state law, 42 U.S.C. § 1983, and, more specifically, the protection of the right to a nondiscriminatory franchise.

"Despite the benefit to plaintiffs' class, however, and despite this suit's effectuating the purpose of congressional legislation, the case *sub judice* is one most private individuals would hesitate to initiate and litigate. . . .

"Consequently, in order to attempt to eliminate these impediments to *pro bono publico* litigation, such as is here involved, and to carry out congressional policy, an award of attorneys' fees is essential."

The court rejected the theory adopted in *Sincock v. Obara*, No. 100.09, *supra*, that state officials are immune from awards of attorneys' fees:

"Individuals who, as officers of a state, are clothed with some duty with regard to a law of the state which contravenes the Constitution of the United States, may be restrained by injunction, and in such a case the state has no power to impart to its officers any immunity from such injunction or from its consequences, including the court costs incident thereto. *Ex parte Young*, 209 U.S. 123, 160 (1908); cases collected in U.S.C.A. Note 121 to Amendment 11 of the Constitution of the United States; *Williams v. Eaton*, 443 F.2d 422, 428 (10th Cir. 1971)."

100.11 - *Reed v. Quave*, ____ F. Supp. ____ (S.D. Miss. May 30, 1967)

- A. Civil Action No. 3146
- B. Counsel for Plaintiffs: Upton Sisson (Gulfport, Miss.)
Counsel for Defendants: George R. Smith (Gulfport, Miss.)
- C. Decree, Cox, J., May 30, 1967

Suit filed in 1967 to redistrict Harrison County, Mississippi. The court ordered the adoption of new districts, but ordered that the 1967 elections for County Board of Supervisors be held at-large.

"The Court further finds that this is a class action and that the sum of \$5,000.00 is a reasonable attorney fee to be allowed the plaintiffs herein and taxed as a part of the costs."

* * *

Reed v. Quave, ____ F. Supp. ____ (S.D. Miss. May 14, 1971)

- A. Civil Action No. 3146
- B. Counsel for Plaintiffs: Upton Sisson (Gulfport, Miss.)
Counsel for Defendants: White & Morse (Gulfport, Miss.)
- C. Order, Nixon, J., May 14, 1971

Following the 1967 decision in this case, *supra*, the plaintiffs filed a supplemental complaint. The district court found that because of temporary population shifts caused by Hurricane Camille, it was impossible to make accurate population counts. The court therefore ordered the 1971 elections for County Board of Supervisors to be held at-large.

The court also found "[t]hat this is a class action and that the plaintiff should be awarded a reasonable attorney's fee to be taxed as part of the costs against the defendant, Board of Supervisors." The court fixed the fee at \$2,500, "as agreed between the parties," to be "taxed against the defendant, Board of Supervisors, and to be paid by it from the funds of Harrison County, Mississippi."

100.12 - *London v. East Feliciana Parish Police Jury*, ____ F. Supp.
 ____ (E.D. La. May 16, 1972)

A. Civil Action No. 71-306

B. Counsel for Plaintiffs: Stanley Halpin (New Orleans,
 La.)
 Counsel for Defendants: Richard Kilbourne

C. Consent Decree, E. Gordon West, J., May 16, 1972

Class action to reapportion the police jury and school board of East Feliciana Parish, Louisiana, on fourteenth- and fifteenth-amendment grounds.

The Eastern District of Louisiana, on February 7, 1972, ordered both governmental bodies to reapportion themselves, and to submit their reapportionment plans for clearance under section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. The Justice Department thereafter approved the plan for the police jury, but rejected, as racially discriminatory, the school board's plan.

The court, E. Gordon West, J., subsequently signed a consent decree approving the cleared police jury plan, and shortening the terms of the police jurymen elected in an invalidly apportioned election to only three months -- the time required to hold new elections under the new plan.

The court also awarded plaintiffs' attorney fees of \$500 -- an award to which defendants' attorneys had not consented, but which the court had ordered orally on February 2, 1972.

100.13 - *Hargrove v. Caddo Parish School Board*, ____ F. Supp. ____
(W.D. La. June 13, 1972)

A. Civil Action No. 17,630

B. Counsel for Plaintiffs: Sydney B. Nelson
Counsel for Plaintiff-Intervenors: Stanley Halpin
(New Orleans, La.)

C. Judgment, June 13, 1972

After the court adopted the defendant school board's plan of reapportionment, rather than that proposed by black plaintiff-intervenors, it nonetheless awarded plaintiff-intervenors \$1,500 attorneys' fees.

"[P]laintiff-intervenors . . . by their intervention and diligent efforts throughout these proceedings, have performed a service both to the Court and to the people of Caddo Parish. Plaintiff-intervenors, and the Court itself, raised the issue of the prohibition against dilution of black voting strength with which any redistricting plan must comply. Further, plaintiff-intervenors through the skill of their counsel and the use of an expert witness raised the level of accuracy of the 'one-man, one-vote' mandate by demonstrating the statistical problems of employing voter registration data and made known to the Court as well as the Board the availability of block data, without which the Court-approved plan could not be designed.

"Since the Board had made a good faith effort to reapportion prior to the bringing of this law suit, it would be unfair to tax it with the full amount of attorney's fees requested by plaintiff-intervenors. However, since plaintiffs have performed a necessary and important service, it would also be unfair totally to deny their motion for attorney's fees."

100.14 - *Clark v. DeSoto Parish Police Jury*, ____ F. Supp. ____ (W.D. La. June 14, 1972)

A. Civil Action No. 17,266

B. Counsel for Plaintiffs: Stanley A. Halpin (New Orleans, La.)

C. Opinion, Dawkins, J., June 14, 1972

Suit to reapportion the DeSoto Parish Police Jury and School Board to accord with one man, one vote.

On January 28, 1972, the Western District of Louisiana, Dawkins, J., preliminarily enjoined defendants to file reapportionment plans by the end of February. (Although the Attorney General had ruled that the plans submitted by both governmental bodies were not racially discriminatory under section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, he had not ruled on their constitutionality under the fourteenth amendment, and the court found that they did not meet the fourteenth amendment standards of population equality.) At that time, the court stated, it would hear the relative merits of both the plan already submitted by the plaintiffs and the plan to be submitted by defendants.

The court held a hearing on April 17, 1972, and entered an order redistricting the DeSoto Parish Police Jury and School Board. At that time it took under advisement plaintiffs' motion for attorneys' fees.

On June 14, 1972, the court awarded plaintiffs attorneys' fees of \$2,500, stating:

"The duty of Police Juries and Schools to redistrict so as to create districts of equal population and which are not racially discriminatory is a clear one. When private individuals undertake the task of litigation to compel the governing body to perform this clear duty, they are performing a service which benefits all of the people in the Parish. The task is not a light one. In reapportionment cases where defendants have failed properly to redistrict, plaintiffs' attorney must spend many hours obtaining Census Bureau maps and data, and devising possible plans of apportionment, in addition to the normal hours spent in investigating the case, preparing the pleadings, preparing for trial and making court appearances. Considering these pleadings, memoranda, and plans filed by plaintiffs in this case and the conferences and hearings conducted herein, the Court finds that an award of attorney's fees in the amount of \$2,500.00 is entirely reasonable.

"Other Federal District Courts have recognized the appropriateness of attorney's fees in local reapportionment

[Continued]

100.14 (Cont'd)

cases [Citing Cases.] In most of these cases plaintiffs probably deserve more than \$2,500.00 in attorney's fees; however, that is the amount plaintiffs have requested and the Court finds that sum to be adequate. Since this case included reapportionment of both the Police Jury and the School Board, they are ordered to divide the cost of attorney's fees, each paying plaintiffs' attorney \$1,250.00."

- 100.14 -

February 19

100.15 - *Briscoe v. Jefferson Davis Parish Police Jury*, ____ F. Supp.
 ____ (W.D. La. Sept. 2, 1972)

A. Civil Action No. 17,392

B. Counsel for Plaintiffs: George M. Strickler, Jr. (New Orleans, La.)
 Counsel for Defendants: Bernard N. Mercantel (Jennings, La.)

C. Memorandum, Hunter, J., September 2, 1972

Class action to reapportion the Police Jury and School Board of Jefferson Davis Parish, Louisiana. In awarding attorneys' fees, the court found that

(1) both bodies "operated under districting plans which were not in compliance with constitutional standards";

(2) the suit was "necessitated by the actions of the defendants";
 and

(3) "This suit was filed on behalf of not only a class of black voters in the Parish, but also on behalf of a class of all voters of both races in the under-represented wards of the parish. The implementation of a constitutional apportionment plan thus benefited a large part of the Parish's population."

(4) "In order to prosecute this action, plaintiffs' attorney was required to do considerable . . . work . . ."; and, finally,

(5) "*Awards of attorneys' fees in reapportionment cases have become a matter of course.*" [Emphasis added.]

The court awarded attorneys' fees in an amount later to be fixed.

100.16 - *Ferrington v. Franklin Parish Police Jury; Beach v. Franklin Parish School Board*, ____ F. Supp. ____ (W.D. La. Feb. 1, 1972)

A. Civil Action Nos. 17,429, 17,469

B. Counsel for Plaintiffs: Paul Kidd (Monroe, La.)
Counsel for Defendants: Rudolph McIntyre

C. Consent Decree, Scott, J., February 1, 1972

Consolidated actions reapportioning the Franklin Parish School Board and Police Jury. Without even stating reasons therefor, the court assessed attorneys' fees for plaintiffs' lawyer in the amount of \$1,000, to be taxed equally against the School Board and Police Jury.

100.17 - *Thompson v. The Richland Parish Police Jury*, ____ F. Supp. ____ (W.D. La. August 31, 1972), *aff'd*, ____ F.2d ____ (5th Cir., No. 72-3413, June 13, 1973)

A. No. 16,433

B. Counsel for Plaintiffs: Paul Kidd (Monroe, La.)
 Counsel for Defendants: William R. Coenen (Rayville, La.),
 John F. Ward, Jr. (Rayville, La.)

C. Opinion, Dawkins, J., August 31, 1972

Suit to reapportion the Richland Parish, Louisiana, School Board and Police Jury. After the Parish bodies were successfully reapportioned in August 1972, the Western District of Louisiana, Dawkins, J., awarded successful plaintiffs counsel fees, even though their request for fees was not made until ten months after the completion of the substantive portion of the case:

"The defendants apportioned themselves only after being sued to do so and steadfastly adhered to their plan of reapportionment after this Court declared same to be unconstitutional. The defendants moved to set aside the Court approved plan of reapportionment by a 'Motion for Reconsideration' and then appealed same before finally abandoning their endeavors."

The court awarded \$2,500.00, and the Fifth Circuit on appeal summarily affirmed the award.

100.18 - NAACP, *Minden Chapter v. Webster Parish School Board*, ____ F. Supp. ____ (W.D. La. July 9, 1973)

A. Civil Action No. 17981

B. Counsel for Plaintiffs: Stan Halpin (New Orleans, La.)

C. Opinion, Dawkins, J., July 9, 1973

Class action to reapportion the Webster Parish, Louisiana, School Board and Police Jury. At a hearing on defendants' proposed reapportionment plan, plaintiffs showed the plan was racially gerrymandered. The Western District of Louisiana, Dawkins, J., then referred the case to a special master, who "took steps to correct this portion of the plan."

The district court then awarded plaintiffs' counsel attorneys' fees of \$4,602.50, or \$35 per hour for 131-1/2 hours work, stating:

"Redistricting cases by their nature are factually and legally complex, particularly when the issue of racial discrimination is present. In order to prosecute this action, plaintiffs' attorneys were required to do considerable background work which included analysis of the existing redistricting plan, preparation of an alternate plan, analysis of defendants' single-member district plan which was drafted by an acknowledged expert demographer, in addition to legal research. Additionally, plaintiffs' attorneys spent many hours conferring with opposing counsel, the defendants' expert, and the Court in negotiations to narrow the areas of contention. Although not specifically required or authorized to do so, the master found that it is beyond doubt that counsel for plaintiffs could have and did expend the time as listed. This Court concurs.

"Awards of attorney's fees in redistricting cases have become practically a matter of course.

"Under the former more restrictive rule bad faith was frequently held to be a prerequisite to an award of fees. However under more recent interpretations the Courts have looked to benefit to the public rather than to punishment to defendants in awarding fees. Under either theory plaintiffs would be entitled to an award of fees. Defendants did not develop a constitutionally sufficient plan until after suit was brought and even its single-member district plan was deficient in one respect.

"As to the amount of fees, this Court finds that it is

[Cont'd]

100.18 (Cont'd)

reasonable to award plaintiffs fees at \$35.00 per hour for the 131-1/2 hours listed in the stipulation for a total of \$4,602.00. Given the complexity of this case the number of hours expended is abundantly reasonable. Both of the attorneys for plaintiffs have extensive experience in federal litigation in civil rights matters and in addition Mr. Halpin, who served as trial counsel, has extensive experience litigating redistricting cases. Less experienced counsel would have certainly spent many more hours in preparation and trial of this case. Indeed the efficiency of plaintiffs' counsel should justify a higher rate per hour, but counsel has indicated that \$35.00 per hour would be satisfactory. The diligence of counsel in public interest cases should be encouraged, not penalized. The service to all of the people of Webster Parish by insuring compliance with constitutional requirements is not to be underestimated.

"Awards of attorney's fees in cases of this sort are not punitive but compensatory and the measure is not the degree of bad faith of the defendants, but the service to the public." [Citations omitted.]

100.19 - *Beens v. Erdahl*, ____ F. Supp. ____ (D. Minn. Dec. 14, 1972)

A. No. 4-71-Civ. 151

B. Counsel for Plaintiffs: Alan W. Weinblatt (St. Paul, Minn.)
Counsel for Defendants: John M. Mason (St. Paul, Minn.)

C. Order, Larson, J., December 14, 1972

In April 1971, plaintiffs filed suit under 42 U.S.C. § 1983, 1988, seeking to declare the Minnesota legislative apportionment unconstitutional, and to enjoin all elections until the legislature was constitutionally apportioned. In November, the three-judge court found the apportionment constitutionally defective, enjoined the holding of any elections, and appointed two special masters to draw a plan before the scheduled 1972 general elections. Later in November, the court set out criteria it would consider in adopting a new plan, whether proposed by plaintiffs, defendants, or the special masters.

In December the court said it would consider only plans which drastically reduced the size of the legislature.

On January 25, 1972, after considering all plans submitted by all parties, the court adopted its own special masters' plan. 336 F. Supp. 715 (D. Minn. 1972).

The state senate, a defendant-intervenor in the action, appealed to the Supreme Court, which vacated and remanded on the ground that the district court had exceeded its power in reducing the legislature's size so drastically. 406 U.S. 187 (1972).

On remand, the three-judge court adopted a new special master's plan, which returned the legislature to its previous size and contained population deviations of less than 2 percent from ideal. 349 F. Supp. 97 (D. Minn. 1972).

Thereafter the court, Larson, J., on December 14, 1972, allowed plaintiffs their costs, expert witness fees and attorneys' fees for (1) the period from April 1971 to December 1971, and (2) the Senate's appeal to the Supreme Court, at a rate of \$30 per hour, for \$16,582.50 attorneys' fees, \$2,524.87 costs, and \$3,460.00 expert witness fees, or a total of \$22,567.37. (The court apparently reasoned that most of the work done after December 1971 was performed by special masters, except for the appeal.)

100.20 - *Turner v. McKeithen*, _____ F. Supp. _____ (W.D. La. July 9, 1973)

A. Civil Action No. 15,411

B. Counsel for Plaintiffs: Stan Halpin (New Orleans, La.)

C. Opinion, Dawkins, J., July 9, 1973

Suit to reapportion the Ouachita Parish School Board and Police Jury. After reapportionment was complete, the Western District of Louisiana, Dawkins, J., awarded successful plaintiffs counsel fees of \$14,000:

"Plaintiffs were forced to bring this suit because of defendants' failure to comply with the clear provisions of the law and forced to aggressively prosecute the suit at every step in order to assure compliance. Plaintiffs' counsel is experienced in handling redistricting cases and his diligence, expertise and efficiency have allowed him to expedite these proceedings which would have been considerably longer in the hands of less experienced counsel. Nevertheless . . . it is clear that plaintiffs' counsel has spent in excess of 400 hours in this litigation which has now lasted more than three years. . . . Considering the evidence and awards of this Court and other federal courts . . . this Court deems an award of \$14,000.00 in attorney's fees reasonable. If the Court would compute the fee according to the number of hours at a rate commensurate with plaintiffs' counsel's skill and expertise the amount would be considerably higher; however, the Court considers the foregoing amount satisfactory.

"As grounds for the award, the Court finds that defendants' action in failing to apportion themselves and other actions amounted to obstinacy Additionally the Court finds that fees are appropriate under the 'public benefit' theory

"Indeed attorney's fees in redistricting cases have become almost a matter of course, and the amount of these awards supports the Court's determination of a reasonable award herein."

100.21 - *Fairley v. Patterson*, ____ F. Supp. ____ (S.D. Miss. Feb. 20, 1973)

A. Civil Action No. 2205

B. Counsel for Plaintiffs: George Peach Taylor (Jackson, Miss.)

Counsel for Defendants: Rowland W. Heidelberg (Hattiesburg, Miss.)

C. Opinion, Cox, J., February 20, 1973

After the Supreme Court, in the above portion of *Allen v. Board of Elections*, 393 U.S. 544 (1969), ruled unenforceable a change in Mississippi's voting laws which had been unclear under section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, the district court on remand allowed intervention by a party seeking to redistrict Forrest County, and the case became a redistricting action. The original plaintiffs were black and the intervenors were white. Upon an invitation by the court, original plaintiffs' attorneys had a reapportionment plan drawn up. The court, however, found defendants' own reapportionment plan acceptable. Defendants stipulated to, and paid, intervenors' attorney \$1,500 for his services, and original plaintiffs' attorneys then moved for attorneys' fees and expenses. Plaintiffs' attorney sought fees for 123 hours of work, \$204.80 in telephone and travel expenses, and \$9,335 for preparation of the court-requested plan by a private firm.

The Southern District of Mississippi, Cox, J., finding that plaintiffs had been represented by salaried counsel of a foundation-funded organization, awarded plaintiffs' counsel only \$1,500 attorneys' fees, and denied counsel's expense claims:

"The movants, represented by George Peach Taylor, are employed and paid for their services by a tax free national foundation which employs attorneys to engage in such civil rights activities of public interest and importance, and furnishes all necessary revenues therefor. George Peach Taylor has been paid his regular salary and is not due anything for this service he rendered, but any award made by the Court for this service will inure in its entirety to this tax free foundation engaged in such business at Jackson as a non-profit operation. There is no question but that such services of the movants were very helpful and beneficial to the Court in bringing such plan to fruition."

The court found that

"This was not a redistricting case until this Court made it so. The movants thus surely had no part in instituting a redistricting case with the result indicated. . . . Any award made pursuant to such motion will be directly channeled into the coffers of the Ford Foundation which enjoys

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100.21 (Cont'd)

its own reward at public expense by its tax exemption status. It undoubtedly does much good and is not criticized for its activities, but they are not such as to enlist an equitable award from this Court under the circumstances. In view of the agreed award of an attorney's fee to the intervenor, however, it would appear equitable and proper to allow the movants a like amount for a much greater service rendered the Court in this case. Accordingly, the Court will award the movants \$1,500.00 for their service in this case in spite of the circumstances mentioned, and will deny the expense claim in its entirety."

The case has been appealed, both as to the merits and as to the limited attorneys' fee award.

100.22 - *Jordan v. Mahoning County Board of Elections*, ____ F. Supp. ____ (N.D. Ohio May 19, 1972)

A. No. C-71-1130-Y

B. Counsel for Plaintiffs: Nathaniel Jones (New York City, N.Y.) Albert J. Ortenzio (Youngstown, Ohio)

Counsel for Defendants: James Laurenson (Columbus, Ohio)

C. Order, Battisti, J., May 19, 1972

Suit under 42 U.S.C. § 1983 to reapportion the State Legislature of Ohio. After the court accepted the plaintiffs' reapportionment plan, it awarded a total of \$26,010 attorneys' fees and expenses of \$1,262.65, against the State of Ohio and its Governor and officers.

At a subsequent date, state defendants filed a motion to reconsider under Rule 60(b), alleging that the eleventh amendment precludes the award of attorneys' fees against a State defendant. On June 12, 1973, the court, Battisti, J., refused to reopen the case under Rule 60(b):

"Counsel for plaintiff performed a valuable service for the people of the State of Ohio in proposing an acceptable reapportionment plan for the State legislature. The Court awarded reasonable fees as compensation for these services, and counsel for the State neither objected nor appealed when the award was made. . . ."

* * *

"Even assuming, *arguendo*, that the Eleventh Amendment argument were sound, the judgment entered herein is res judicata as to any issue which was or could have been raised in the initial proceedings. . . . Thus the Court need not decide the Eleventh Amendment question at this time. It should be noted in passing, however, that at least one other three-judge court has awarded attorney fees in similar circumstances, *Sims v. Amos*, 340 F. Supp. 691 (N.D. Ala. 1972), *aff'd*, 409 U.S. 942 (1972). More recently, Judge Young considered this argument and rejected it in a detailed and well-reasoned opinion. *Taylor v. Perini*, ____ F. Supp. ____ (N.D. Ohio, No. C 69-275, decided May 23, 1973).

* * *

"Defendants have shown no valid reason to justify reopening this case. Accordingly, their motion under Rule 60(b) is denied."

[Continued]

100.22 (Cont'd)

The State had initially refused to pay, so the plaintiffs levied execution on state funds held in an account in a Cleveland bank. On February 2, 1973, the court ordered the sum of the fee turned over to the plaintiffs by the bank, but on March 9, 1973, the court noted that the State had paid the fees and vacated the attachment.

The case is now on appeal.

200.01 - *Bradley v. School Board of the City of Richmond, Virginia*, 345 F.2d 310 (4th Cir. 1965) (*en banc*)

A. No. 9471

B. Counsel for Plaintiffs: Hill, Tucker & Marsh (Richmond, Va.)
Counsel for Defendants: Henry T. Wickham & H. I. Willett
(Richmond, Va.)

C. Sobeloff, Haynsworth, Boreman, Bryan & Bell, JJ.

D. Opinion, Haynsworth, J., April 7, 1965

Appeal from the decision of the Eastern District of Virginia, Butzner, J., which held that a freedom-of-choice plan was constitutional. The Fourth Circuit affirmed.

The trial court had granted attorneys' fees of only \$75.00, and that only for representation of two plaintiffs who had been added at the eleventh hour by order of the court. The Fourth Circuit affirmed, saying:

"It is only in the extraordinary case that such an award of attorneys' fees is requisite. . . . Such an award is not commanded by the fact that substantial relief is obtained. . . . Whether or not the board's prior conduct was so unreasonable [as to merit an award of attorneys' fees] was initially for the District Judge to determine. Undoubtedly he has large discretion in that area, which an appellate court ought to overturn only in the face of compelling circumstances. . . ."

Sobeloff and Bell, JJ., dissenting in part, stated:

"We also dissent from the allowance of only \$75.00 as counsel fees to the plaintiffs, which we deem egregiously inadequate. It will not stimulate school boards to desegregate if they see that they can gain time by resisting to the eleventh hour without effective discouragement of these tactics by the courts.

"The principle applied by this court in *Bell v. School Board of Powhatan County, Virginia*, 321 F.2d 494 (4th Cir. 1963), needs to be extended, not narrowed. . . . It ought not to be reserved for the most extreme cases of official recalcitrance, but should operate whenever children are compelled by deliberate official action or inaction to resort to lawyers and courts to vindicate their clearly established

200.01 [Cont'd]

and indisputable right to a desegregated education. Counsel fees are required in simple justice to the plaintiffs. The award of fees in this equity suit is in the court's judicial discretion and should be commensurate with the professional effort necessarily expended. One criterion which may fairly be considered is the amounts found reasonable in compensating the Board's attorneys for their services. While public monies, aggregating thousands of dollars, are paid defense lawyers, the attorneys for the plaintiffs who have prosecuted these cases for two full rounds in the District Court and on appeal are put off with a miniscule fee of \$75.00."

* * *

Bradley v. School Board of the City of Richmond, Virginia, 53 F.R.D. 28, (E.D. Va., May 26, 1971)

A. Civil Action No. 3353-R

B. Counsel for Plaintiffs: Norman Chachkin (New York City),
Louis R. Lucas (Memphis), *et al.*

C. Opinion, Merhige, J., May 26, 1971

In a school desegregation suit, Merhige, J., awarded successful plaintiffs \$43,355.00 attorneys' fees, plus expenses of \$13,064.65, for a total of \$56,419.65. Costs were assessed against the defendant City School Board. The suit had been in litigation for ten years. An award of attorneys' fees was denied in 1965 (*see above*). The award now granted covers only the latest stage, from March 10, 1970, through January 29, 1971 -- a period of some ten months.

"In light of the defendants' conduct before and during litigation, and by reason of the unique character of school desegregation suits, justice requires that fees should be awarded."

Although defendants stated that freedom-of-choice plans were unconstitutional, they refused to admit that the segregation of the Richmond public schools was at the present maintained by such plans, thereby costing plaintiffs unnecessary time and expense to prove it. Defendants also proposed a first plan which would bring about "obviously unacceptable" results. "[I]n general, astonishingly, race was not taken into account in the formulation of the plan." "Consideration of residential segregation in drawing zone lines was omitted . . . transportation was not seriously considered as a desegregation tool" "[T]he plan was manifestly invalid . . . and . . . should never have been proposed to the Court."

200.01 [Cont'd]

Defendants' second plan, submitted a month later, was also inadequate, but was accepted as an interim measure because time was too short to devise another plan before the beginning of the school year. Plaintiffs therefore got only partial relief. In mid-year, the court did not order further relief.

In a hearing for the following school year, defendants offered three plans, only one of which would substantially have reduced segregation -- the one of which they did not urge adoption. The court ordered this plan into effect.

"[C]ourts recognize a power in themselves, necessary at times in order fully to achieve justice, to direct that a losing litigant pay his opponent's attorney's fees. This power, if it has a statutory source at all, is conferred implicitly in the grant of equitable jurisdiction."

However, in certain cases "legislative directives sometimes provide that a court may or must award a winning plaintiff reasonable counsel fees." Questions therefore arise about whether courts may or may not award such fees in the absence of specific legislative directives.

Plaintiffs do not argue that there is such specific legislation in this case. The question is, therefore, whether this court has the power, in its equitable jurisdiction, to award attorneys' fees.

Case law is extensive, and shows that courts of equity can award such fees if the circumstances warrant. The question now, then, is whether the facts of this case justify a discretionary award.

The "fund theory" cannot apply in this case without stretching and making "unproved assumptions," but it is not the only basis for an award of attorneys' fees.

"At each stage of the proceedings the School Board's position has been that, given the choice between desegregating the schools and committing a contempt of court, they would choose the first, but that in any event desegregation would only come about by court order."

"Because the relevant legal standards were clear it is not unfair to say that the litigation was unnecessary. It achieved, however, substantial delay in the full desegregation of city schools. Courts are not meant to be the conventional means by which persons' rights are afforded. The law favors settle-

200.01 [Cont'd]

ment and voluntary compliance with the law. When parties must institute litigation to secure what is plainly due them, it is not unfair to characterize a defendant's conduct as obstinate and unreasonable and as a perversion of the purpose of adjudication, which is to settle actual disputes."

"Not only has the continued litigation herein been precipitated by the defendants' reluctance to accept clear legal direction, but other compelling circumstances make an equitable allowance necessary. This has been a long and complex set of hearings. Plaintiffs' counsel have demonstrated admirable expertise . . . but from the beginning the resources of opposing parties have been disproportionate. . . ."

"Moreover, this sort of case is an enterprise on which any private individual should shudder to embark. No substantial damage award is ever likely, and yet the costs of proving a case for injunctive relief are high. To secure counsel willing to undertake the job of trial, including the substantial duty of representing an entire class (something which must give pause to all attorneys, sensitive as is the profession to its ethical responsibilities) necessarily means that someone -- plaintiff or lawyer -- must make a great sacrifice unless equity intervenes. Coupled with the cost of proof is the likely personal and professional cost to counsel who work to vindicate minority rights in an atmosphere of resistance or outright hostility to their efforts."

"Still further, the Court must note that the defendants' delay and inaction constituted more than a cause for needless litigation.

"The circumstances which persuaded Congress to authorize the payment of attorney's fees by statute under certain sections of the 1964 Civil Rights Act . . . very often are present in even greater degree in school desegregation litigation [e.g., private plaintiffs being forced to go to much trouble and expense to insure that the law will be adhered to for all -- the concept of "private attorneys-general."]

"School desegregation cases almost universally proceed as class actions. Use of this unconventional form of action converts a private lawsuit into something like an administrative hearing on compliance of a crucial public facility with legal rules defining, in part, its mission."

"Manifestly, too, not only are the rights of many asserted

200.01 [Cont'd]

in such suits, but also it has become a matter of vital governmental policy not just that such rights be protected, but that they be immediately vindicated in fact.

"The private lawyer in such a case most accurately may be described as 'a private attorney general.' Whatever the conduct of defendants may have been, it is intolerably anomalous that counsel entrusted with guarantying the effectuation of a public policy of nondiscrimination as to a large proportion of citizens should be compelled to look to himself or to private individuals for the resources needed to make his proof. The fulfillment of constitutional guaranties, when to do so profoundly alters a key social institution and causes reverberations of untraceable extent throughout the community, is not a private matter. . . . Under the Civil Rights Act courts are required fully to remedy an established wrong . . . and the payment of fees and expenses in class actions like this one is a necessary ingredient of such a remedy." [Citations omitted.]

"Where the interests of so many are at stake, justice demands that the plaintiffs' attorneys be equipped to inform the court of the consequences of available choices; this can only be done if the availability of funds for representation is not left to chance. In this unprecedented form of public proceeding, exercise of equity power requires the Court to allow counsel's fees and expenses, in a field in which Congress has authorized broad equitable remedies 'unless special circumstances would render such an award unjust.'"

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As for the amount of the fees to be awarded, the court stated:

"Trial counsel for the plaintiffs demonstrated throughout the litigation a grasp of the material facts and a command of the relevant law equaled by very few lawyers who have appeared before this Court. Needless to say their understanding of the field enabled them to be of substantial assistance to the Court, which is their duty."

"In this case the marshalling of evidence on liability and especially on remedy were complex tasks. The responsibility was probably as great as ever falls upon a private lawyer. Time spent was considerable The subject of the litigation was of the utmost importance. The Court has already referred to the lawyers' performance, which they undertook without assurance of reasonable compensation. Substantial results, too, were secured by their efforts."

[Continued]

- 200.01 -

February 23

200.01 [Cont'd]

Citing *Campbell County v. Howard*, 112 S.E.2d 876, 885 (1922), the Court stated that other factors "relevant to the value of an attorney's services," were:

"... the amount and character of the services rendered, the responsibility imposed; the labor, time and trouble involved; the character and importance of the matter in which the services are rendered; the amount of money or the value of the property to be affected; the professional skill and experience called for; the character and standing in their profession of the attorneys; and whether or not the fee is absolute or contingent. . . . The result secured by the services of the attorney may likewise be considered; but merely as bearing upon the consideration of the efficiency with which they were rendered, and in that way, upon their value on a quantum meruit, not from the standpoint of their value to the client."

The court allowed fees, listed as "working hours" for attorneys while traveling, because "counsel can and do work while traveling," and because "other complex cases often require parties to enlist the aid of out-of-town counsel, for whose travel time they pay." Also, "the complexity of cases of this sort often, as here, justifies the use of counsel from outside the local bar. The difficulty of retaining local trial counsel must be especially great in litigation over minorities' civil rights."

Also allowed were fees for the testimony of expert witnesses, as "[I]t is difficult to imagine a more necessary item of proof (and source of assistance to the Court) than the considered opinion of an educational expert."

* * *

Bradley v. School Board of the City of Richmond, Virginia, ____ F.2d ____ (4th Cir. Nov. 29, 1972)(*en banc*)

- A. No. 71-1774
- B. Counsel for Appellees: Louis R. Lucas (Memphis, Tenn.)
Counsel for Appellants: George B. Little (Richmond, Va.)
- C. Haynsworth, Winter, Craven, Russell & Field, JJ.
- D. Opinion, Russell, J., November 29, 1972

Appeal by the City of Richmond challenging the above award of attorneys' fees.

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- 200.01 -

200.01 [Cont'd]

The fourth circuit, sitting *en banc*, ruled first that the district court's finding of "obdurate obstinacy," the first basis for its award, was error; that the school board had not refused to accept clear constitutional mandates, but had had understandable difficulty meeting "uncertain" obligations. Finding that the district court's second basis for its award was the "private attorney general" doctrine, the Fourth Circuit then rejected that basis as well. The circuit court found that, because the court below had awarded fees for only that period of the litigation during which it had found "obdurate obstinacy" on the part of the school board, the district court felt the "private attorney general" rationale applied only in "situations where the rights of the plaintiff were plain and the defense manifestly without merit." This being the case, the fourth circuit ruled that the "private attorney general" basis was the same as the "obdurate obstinacy" basis, and was therefore unacceptable.

The court continued: "If . . . an award of attorney's fees is to be made as a means of implementing public policy . . . [a court] must normally find its warrant for such action in statutory authority." Congress, the court noted, had not provided for attorneys' fees in school desegregation cases, although such provisions had been made in equal employment and public accommodations laws. The court found that neither *Mills v. Electric Auto-Lite*, No. 500.03, *infra*, nor *Lee v. Southern Home Sites Corp.*, No. 300.01, *infra*, would "sustain this alternative award as in the nature of a sanction designed to further public policy." *Mills*, said the court, made an award on the basis of benefit, not policy enforcement, and the award in *Lee* was made by analogy to 42 U.S.C. § 3612(c), while no such analogy could be drawn here.

"If . . . the rationale of *Mills* is to be stretched so as to provide a vehicle for establishing judicial power justifying the employment of award of attorney's fees to promote and encourage private litigation in support of public policy as expressed by Congress or embodied in the Constitution, it will launch courts upon the difficult and complex task of determining what is public policy, an issue normally reserved for legislative determination, and, even more difficult, which public policy warrants the encouragement of award of fees to attorneys for private litigants who voluntarily take upon themselves the character of private attorneys-general."

Environmental cases, continued the court, as well as consumer actions, reapportionment cases and first amendment cases would require fee shifting under this theory. Legislatures, not courts, should determine whether these cases should merit attorneys' fees: Congress has spoken on attorneys' fees in several specific areas, and courts should therefore not award fees where Congress has not so spoken, except under traditional equity guidelines.

"[W]hen Congress omits to provide specifically for the allowance of attorney's fees in a statutory scheme designed to further a public purpose, it may be fairly accepted

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200.01 [Cont'd]

that it did so purposefully . . ."

"Accordingly, until Congress authorizes otherwise awards of attorney's fees in school desegregation cases must rest upon the traditional equitable standards . . . which provide ample scope for the award in appropriate cases."

A third section of the court's opinion dealt with section 718 of the Emergency School Aid Act of 1972, p. A-8, *infra*, which plaintiff-appellees urged as a third alternative basis for an award of attorneys' fees. Plaintiff-appellees contended that, because this case was pending on appeal on the date of passage of the Act, the attorneys' fee provision of section 718 should apply to this case. The circuit court, however, ruled that "Section 718 does not reach services rendered prior to June 30, 1972 [the date of passage of the Act]." The court found, in addition, that there had been "no 'final order' pending unresolved on appeal on June 30, 1972, to which this award could attach."

Winter, J., filed an opinion dissenting on all three bases for denial of a fee award -- stating that "obdurate obstinacy was indeed present, and that both section 718 and the private attorney general theory should apply in this case."

Specifically dealing with the applicability of section 718, Judge Winter stated that all issues in the case had not been terminated on the effective date of the Act because the instant appeal was pending on that date:

"This is not a case where a subsequent statute is sought to be applied to events long past and to issues long finally decided. Rather, it is a case which presents the concurrent application of a statute to an issue still in the process of litigation at the time of its enactment."

He stated the law is clear that, absent specific Congressional intent to the contrary, a law passed while an appeal is pending, if applicable, must be applied to the case by the appeals court. He also found that section 718 was very similar, in language and purpose, to Titles II and VII of the Civil Rights Act of 1964, and should therefore be governed by the rule governing fee awards under those Titles -- that a fee is almost automatic absent special circumstances which would render such an award unjust.

200.26 - *Bates v. Hinds*, 334 F. Supp. 528 (N.D. Texas Nov. 9, 1971)

A. Civil Action No. 2-831

B. Opinion, Hill, J., November 9, 1971

Suit by dismissed teacher under 42 U.S.C. § 1983, seeking reinstatement and back pay.

The court ruled that plaintiff's hearing had been deficient, and that he was therefore due back pay. Although plaintiff's counsel sought fees of \$12,000, ". . . the Court feels that attorney's fees must bear some relation to the amount in controversy . . ." and therefore awards plaintiff's counsel \$5,000 in attorneys' fees.

200.27 - *Moore v. Knowles*, ____ F. Supp. ____ (N.D. Texas Oct. 28, 1971)

A. Civil Action No. CA-2-901

B. Counsel for Plaintiffs: Larry Watts (Houston, Tex.)
Counsel for Defendants: R. A. Wilson (Amarillo, Tex.)

C. Opinion, Woodward, J., October 28, 1971

Suit under 42 U.S.C. § 1983 seeking reinstatement and attorneys' fees for dismissed school teacher.

The court awarded plaintiff one year's salary because procedural due process requirements had not been complied with. The court also awarded plaintiff's counsel attorneys' fees of \$5,000 -- less than the full amount requested because the amount requested included time spent working on overlapping litigation.

* * *

Moore v. Knowles, 482 F.2d. 1069 (5th Cir. 1973)

A. No. 71-3523

B. Counsel above.

C. Wisdom, Thornberry & Godbold, JJ.

D. Opinion, per curiam, August 2, 1973

On September 11, 1972, the Fifth Circuit, Wisdom, Thornberry & Godbold, JJ., in a per curiam opinion, held that "a mere expectancy of employment does not necessitate a hearing," and therefore reversed the district court's award of back pay and attorneys' fees, and taxed costs against plaintiff-appellee Moore. 466 F.2d 531 (5th Cir. 1972).

Nearly a year later, on a petition for rehearing, the same panel withdrew its earlier opinion reversing the district court. Instead, it vacated the portion of the district court's opinion dealing with back pay and attorneys' fees, and remanded to the district court

"to determine whether under present . . . standards Moore had such status in the school system that he was denied due process by the refusal without a hearing to consider renewal of his contract, and, if he did have such status, to award appropriate back pay and attorney fees as a result of the deprivation of his property without due process."

200.28 - *Downs v. Conway School District*, ____ F. Supp. ____ (E.D. Ark.
June 23, 1971)

A. No. LR-70-C-160

B. Opinion, Clary, J., June 23, 1971

Suit by dismissed teacher seeking damages, declaratory and injunctive relief, and attorneys' fees.

The court found that plaintiff's dismissal was both substantively and procedurally defective, and ordered her reinstated for the following school year and thereafter. It also awarded her back pay and attorneys' fees, to be fixed by the court upon written application.

200.31 - *Karstetter v. Evans*, ____ F. Supp. ____ (N.D. Texas Dec. 7, 1971)

A. Civil Action 7-573

B. Opinion, Hughes, J., December 7, 1971

Teacher dismissal suit, wherein Judge Hughes ruled that a teacher dismissed in a procedurally deficient manner was due both back pay and reasonable attorneys' fees, to be fixed by the court.

200.32 - *Brewer v. School Board of the City of Norfolk, Virginia*,
 _____ F.2d _____ (4th Cir. March 7, 1972) (*en banc*)

A. Nos. 71-1900 and 71-1901

B. Counsel for appellants: Hill, Tucker & Marsh (Richmond,
 Va.), Jack Greenberg, James
 Nabrit & Norman Chachkin (New
 York City)

Counsel for appellees: Marshall T. Bohannon, Jr. &
 Allan G. Donn

C. Haynsworth, Winter, Craven, Butzner, Russell & Field,
 JJ.

D. Opinion, Russell, J., March 7, 1972

Appeal from the Eastern District of Virginia, McKenzie, J., which, on remand from the fourth circuit, adopted new desegregation plans for the Norfolk school system. The fourth circuit now finds that the desegregation plans so adopted are constitutional, with one exception: the plans call for school children to attend schools far from their homes, but provide no means for the children to get to and from those schools. Although the Norfolk city schools have not heretofore provided free buses or operated a bus system, "the Court cannot compel the student to attend a distant school and then fail to provide him with the means to reach that school," so a free busing system must be provided for the school children.

The district court found that defendants had acted in good faith, and therefore denied plaintiffs' request for attorneys' fees. The fourth circuit does not dispute the lower court's finding of good faith, but does award attorneys' fees on another ground: a "quasi-application of the 'common fund' doctrine." Although plaintiffs have not made a monetary recovery from which fees could be assessed, they do receive a pecuniary benefit by virtue of the fact that each school child, in the absence of this ruling, would have been forced to spend approximately \$60 per year on transportation. Because plaintiffs, most of whom are poor, recovered no money, asking them to pay counsel "would defeat the basic purpose of the relief . . . , which was to secure for the student concerned transportation *without cost or deduction*." In this particular case, therefore, the "only feasible solution" is to assess attorneys' fees as costs against the Board.

* * *

Winter, J., concurring specially, would award attorneys' fees on a broader basis than a "quasi-application of the 'common fund' doctrine."

"Conceptually, I see grave difficulties with correlating the award of counsel fees to pecuniary benefits to plaintiffs. The objective in a school desegregation

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case is the vindication of human rights and human rights are rarely translatable into dollar values. Of course, in this case it can be said that plaintiffs will be granted something having a measurable, pecuniary benefit, but in other cases where the right vindicated is not just lack of transportation, which carries a price tag, I can visualize substantial problems in determining whether the vindicated right has an ascertainable monetary value. And even in this case I am left in doubt of the extent to which, if any, the aggregate pecuniary benefit to all of the plaintiffs is to be considered in determining the amount of the allowance to their attorneys. Ordinarily, aggregate monetary recovery is a substantial factor in fixing a fee for legal services. And if difficult here, assuming that total recovery is an element to be considered, what difficulties will arise in future cases where such a convenient measure of the pecuniary benefit is not at hand?"

Judge Winter went on to say that the change from "all deliberate speed" to right now, announced in recent desegregation decisions, is a "change of direction in the immediacy of the application of *Brown I* . . . [and] does not dilute, modify or alter its substance, but I think it requires an extension of the rule we initially announced in *Bell [v. School Board of Powhatan County, Virginia, supra]* Under *Brown*,

"there was room for legitimate debate as to the period of time within which the conflicting demands of aggrieved plaintiffs and the community interest in a smooth, uneventful transition to a unitary system of public education were to be accommodated. . . . By now the transition should have been accomplished. If it has not, the burden of persuasion to explain the delay should rest on those who have failed to achieve it, and not on those whose rights continue to be violated. It seems to me, therefore, to be appropriate now to hold, in the light of [recent desegregation] cases, that reasonable and adequate counsel fees should be awarded as of course unless special circumstances would render an award unjust.

"There is every reason to arrive at this result. Despite the extensive enforcement responsibilities the statutes place on the Departments of Justice and Health, Education and Welfare and their immense resources, we know from the cases which come before us that they have been unable to shoulder the entire burden of litigation to make *Brown I* fully effective. . . . Almost all of the burden of litigation has been upon the aggrieved plaintiffs and those non-profit organizations which have provided them with representation. The time is now when those who vindicate these civil rights should receive fair and equitable compensation from

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200.32 (Cont'd)

sources which have denied them, even in the absence of any showing of 'unreasonable, obdurate obstinacy.'"

* * *

Beckett v. School Board of the City of Norfolk, Virginia, ____ F. Supp. ____ (E.D. Va. Jan. 22, 1973)

A. Civil No. 2214

B. Counsel above

C. Opinion, MacKenzie, J., January 22, 1973

On remand from the above, the Eastern District of Virginia, MacKenzie, J., entered a consent decree providing for free transportation in Norfolk, and then proceeded to discuss an award of attorneys' fees.

The court dismissed plaintiffs' contention that they should be awarded fees on a percentage basis of the "fund" they had recovered for the class they represented -- the public school children of Norfolk, who would have had to pay an estimated \$18,900,000.00 over the next twelve years for transportation to schools had they not won their suit.

"[S]uch counsel fees are generally awarded only against the plaintiffs out of funds found for plaintiffs' use and in plaintiffs' hands. We know of no case in which a contingent fee award was allowed against a defendant who was not represented by the contending counsel and in whose hands no such funds are found. Further, contingent fees are, for the most part, allowed only to counsel who would otherwise receive no compensation unless an appropriate pecuniary award ultimately benefits his plaintiff. Here, counsel have received reimbursement from other sources." [Citation omitted.]

The court then stated that the factors it considered relevant in assessing a reasonable attorneys' fee were:

"(1) the legal intricacy of the free transportation issue; (2) the time reasonably devoted by counsel to the preparation and trial of that issue; (3) the degree of competency displayed by counsel; (4) the benefit resulting from the decision on that issue; (5) the overall nature of the litigation; and (6) the expenses attendant to the trial of the issue."

The court stated that it was satisfied that the issue was legally complex; that the lawyers were capable; and that the resulting benefit was "apparent," thereby

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leaving the issue of the rate at which, and the time for which, counsel should be compensated.

Counsel had maintained no time records, and the court made an award for a total of 476.7 hours, well below the time estimated by counsel.

As for the rate of compensation, the court stated that:

(1) "Counsel for plaintiffs admit their handling of such cases on a 'for nothing' basis, if necessary."

(2) "[A]ttorneys for the defendant School Board have been paid slightly less than \$30 per hour for their total hours."

The court therefore awarded \$30 per hour, or "the highest rate under the Criminal Justice Act, and slightly more than the fees paid defendants' counsel." The total award was thus \$14,301, plus expenses of \$2,759.86.

This case is now on appeal, once more, to the fourth circuit.

200.34 - *Rainey v. Jackson State College* (S.D. Miss. Jan. 18, 1972)

- A. Civil Action No. 4746(C)
- B. Counsel for Plaintiff: A. Spencer Gilbert (Jackson, Miss.)
Counsel for Defendant: William Allain (Jackson, Miss.)
- C. District Judge W. Harold Cox

In a 42 U.S.C. § 1983 suit by a college professor alleging that his dismissal by the college came as a result of activity protected by the first amendment, District Judge W. Harold Cox gave the following Instruction No. 9 for Plaintiff to the jury:

"If you find for the plaintiff, you shall award plaintiff the necessary costs and expenses of this litigation including a reasonable amount for attorney's fees."

On January 18, 1972, judgment was entered against the plaintiff on the merits, and attorneys' fees were therefore denied.

* * *

Rainey v. Jackson State College, 481 F.2d 347 (5th Cir. 1973)

- A. No. 72-1681
- B. Counsel above.
- C. Bell, Thornberry & Grooms, JJ.
- D. Opinion, Bell, J., June 27, 1973

Appeal from the above. Prior to trial on the merits, the Southern District of Mississippi had originally dismissed the case for lack of jurisdiction. Pending appeal, the fifth circuit ordered Dr. Rainey reinstated; when it reached the merits of the appeal, the fifth circuit ruled that the district court did have jurisdiction, and should proceed to try the case. 435 F.2d 1031 (5th Cir. 1970). At that time the fifth circuit left its injunction, which had reinstated Dr. Rainey, in effect until trial could be held in the District Court. Dr. Rainey taught under that injunction for the entire 1970-71 school year, and no further action was taken at that time by the District Court.

After the close of the 1970-71 school year, Dr. Rainey amended his complaint to claim that the college's refusal to hire him for the 1971-72 school year flowed from the same exercise of first amendment rights as the initial contract rescission, and that he should thus be rehired, despite the fact that he had no tenure. Trial was held before a jury, which rejected not only Dr. Rainey's claim that he should be rehired for the 1971-72 school year, but also his claim that the original with-

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200.34 (Cont'd)

drawal of his contract in 1970-71 was unconstitutional.

Dr. Rainey appealed to the fifth circuit once again, claiming entitlement to a judgment notwithstanding the verdict on all claims, including attorneys' fees. The fifth circuit, Bell, J., held that Dr. Rainey was entitled to a judgment notwithstanding the verdict as to the original 1970-71 contract rescission, but it upheld the jury verdict as to the refusal to renew the contract for 1971-72.

As to attorneys' fees, the circuit court held the defendants had been obdurately obstinate until the end of the first appeal in early 1971, as a result of which plaintiff had been reinstated for the remainder of the 1970-71 school year. The court therefore ordered that fees be awarded for all services during that period, as well as for one-half the services on the instant appeal.

The circuit court refused, however, to order fees for services in the district court between the two appeals because (1) as to the 1970-71 claim, that was run-of-the-mill litigation over an essentially moot claim, and (2) as to the 1971-72 claim, that claim was unsuccessful.

200.36 - *McEnteggart v. Cataldo*, 451 F.2d 1109 (1st Cir. 1971)

- A. No. 71-1254
- B. Counsel for Appellant: Philip A. Mason (Boston, Mass.)
Counsel for Appellees: Morris M. Goldings (Boston,
Mass.)
- C. Aldrich, McEntee & Coffin, JJ.
- D. Opinion, Coffin, J., December 1, 1971

Appellant, a nontenured college teacher, filed suit in district court, alleging that the nonrenewal of his contract violated both procedural and substantive due process. The District of Massachusetts ordered that appellant be given a statement of the reasons for nonrenewal, and, when they were produced, dismissed the suit.

Appellant claimed that the college's reasons for his nonrenewal (*i.e.*, that appellant's uncooperativeness was "a threat to the harmony of" his department) were arbitrary and capricious. The first circuit found the college's reasons constitutionally permissible, but assessed attorneys' fees in the appeal against defendants:

"... [W]e assess attorney's fees in this appeal against the defendants. While this may be unusual in that defendants have prevailed on appeal, we think that it provides substantial justice since plaintiff was forced to go to court to obtain the statement of reasons to which he was constitutionally entitled."

200.39 - *Sterzing v. Fort Bend Independent School District*, ____ F. Supp. ____ (S.D. Tex. May 5, 1972)

A. Civil Action No. 69-H-319

B. Counsel for Plaintiff: Clyde Stanley Boose (Houston, Tex.), Leonard J. Schwartz (Columbus, Ohio)
Counsel for Defendants: John L. Jeffers, Jr. (Houston, Tex.), Logene L. Foster (Sugarland, Tex.)

C. Final Judgment & Decree, Bue, J., May 5, 1972

Suit under 42 U.S.C. § 1983, brought by school teacher against the school board which dismissed him, seeking reinstatement, compensatory damages, and attorneys' fees.

The court found that plaintiff had been illegally dismissed for exercising his constitutionally protected right of free speech, although the school board had alleged insubordination as the cause of his dismissal. The court also found a denial of procedural due process. It refused, however, to reinstate plaintiff in his former position:

"[S]ince the Plaintiff was hired on a yearly contract, which contract was fully paid by the school administration, and since reinstatement at this late date would only serve to revive antagonisms, the Court believes the proper exercise of discretion to be denial of the requested reinstatement."

Instead, the court awarded plaintiff \$20,000 "as compensation for lost monetary compensation, loss of opportunity to remain in and advance in his professional career as a classroom teacher, mental suffering, loss of professional status and reputation, and general damages," together with 6 percent interest per annum on the damages from the date of judgment until the date of payment. The court also taxed all costs against defendants, and ordered defendants "to expunge from their employment records, business records, and transcripts, all reference to Plaintiff's discharge in any manner whatsoever. . . ."

The court also awarded plaintiff attorneys' fees of \$5,000, "together with interest from time of judgment at the rate of six per cent (6%) per annum until the claim is paid," stating that

"this Court has been most impressed with the thoroughness and professionalism with which this case has been briefed, presented and argued.

"It is not an easy case; it is a case that can generate intense personal feelings. It is not a case in which any decision can possibly satisfy all."

200.40 - *Berry v. Macon County Board of Education*, ____ F. Supp.
 ____ (M.D. Ala. July 22, 1971)

A. Civil Action No. 875-E

B. Memorandum Opinion, McFadden, J., July 22, 1971

Two named plaintiffs, dismissed employees of the School Board, sued the Macon County, Alabama, School Board under 42 U.S.C. § 1983, seeking reinstatement in their former positions as bus mechanic and bus driver; compensatory and punitive damages; and a declaration that the School Board's policy (under which they had been dismissed) of refusing to reemploy employees whose children attended private, all-white schools, was unconstitutional.

The Middle District of Alabama, McFadden, J., ruled that the School Board could not enforce its policy, which was an unconstitutional infringement of constitutionally protected activity. It determined that the plaintiffs were to be reemployed in their former positions, and were "further entitled to all the benefits of their positions, including retirement credits and general raises in pay, if any, which the plaintiffs would have received had their employment not been terminated."

The court denied both plaintiffs' claims for back pay, on the ground that one had secured employment which paid at least as much as his job with the School Board, and the other had not affirmatively sought alternative employment. Because "[p]roof of a wrong done in violation of 42 U.S.C. § 1983 is taken as sufficient proof of nominal damages," the court awarded plaintiffs \$1.00 each.

On October 20, 1971, the court signed an order on the issue of attorneys' fees. It overruled the defendants' motion to strike plaintiffs' request for taxation of costs in the amount of \$2,500, but it was "not convinced of the reasonableness of the amount of fees claimed by counsel for plaintiffs. Thus, no order will be entered awarding any fees to counsel for plaintiffs, absent a stipulation as to the amount, until a hearing is held by this Court, with all parties in attendance, to determine the reasonableness of the amount to be taxed . . . as an item of costs."

- 200.40 -

200.49 - *Johnson v. Combs*, ____ F. Supp. ____ (N.D. Texas Sept. 8, 1972)

A. Civil Action No. CA-3-5055-D

B. Counsel for Plaintiffs: Johnston, Polk, Larson,
Cloutman & Dixon (Dallas,
Tex.)

C. Amended Judgment, Hill, J., September 8, 1972

School desegregation suit, wherein plaintiffs challenged as racially discriminatory the Grand Prairie, Texas, School District's methods of teacher employment and assignment as well as segregation in elementary and secondary schools. The court, Hill, J., on August 22, 1972, found that there was no discrimination in teacher hiring and assignment and no discrimination or segregation in the secondary school system. It did, however, find segregation in the elementary school system, and ordered zoning and busing to correct the discrimination. The court found no bad faith on the part of defendants, and, in fact, said it would "like to commend the District and its superintendent for their efforts to convert from a dual to a unitary school system." The court then stayed its own order in light of the Education Amendments of 1972.

On September 8, 1972, the court amended its judgment to allow attorneys' fees to successful plaintiffs, citing *Bradley v. School Board of Richmond, Virginia* (No. 200.01, *supra*). It taxed against the defendants the cost of the case and reasonable attorneys' fees of \$2,500.

* * *

Johnson v. Combs, ____ F.2d ____ (5th Cir. Dec. 6, 1972)

A. No. 72-3030

B. Counsel above

C. Thornberry, Morgan & Clark, JJ.

D. Opinion, Clark, J., December 6, 1972

On appeal from the above, the fifth circuit affirmed on the merits, but vacated the fee award and remanded for reconsideration. The court stated that the prior fifth circuit rule in school desegregation cases allowed fees only under the obdurate obstinacy rule, but that the passage of § 718 of the Education Amendments Act of 1972, 20 U.S.C. § 1617, changed the rule and required judicial response to three questions: (1) does the section "merely codify the existing 'unreasonable and obdurately obstinate' standard, or does it set new parameters within which the district court must exercise its discretion"; (2) if new standards have been set up, can they be applied retroactively; and (3) "when is an order a 'final order' within the meaning of the

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200.49 (Cont'd)

statute?"

The court held that, if the suit was "necessary to bring about compliance" in accordance with the statutory language, by analogy to Title II of the Civil Rights Act of 1964, attorneys' fees must be awarded absent "special circumstances," but only fees for those legal services rendered after the date of passage of the Act. Services rendered before passage of the Act, the court stated, would be ruled by the old "obdurate obstinacy" rule, because of "the long-established presumption against retrospective application in the absence of a clear legislative intent," and because "a retroactive application of this statute would punish school boards for good faith action in seeking the guidance of the courts to determine what was required of them."

The court then stated that it found the ruling in *Bradley v. School Board of Richmond, Virginia*, No. 200.01, *supra*, to be inconsistent with its own "obdurate obstinacy" rationale, and, this being the district court's only basis for the award, vacated the amended judgment of the court below, and remanded for further proceedings, stating that the district court should (1) determine if and when a final judgment was rendered; and (2) award plaintiff-appellees \$1,250 for processing the appeal on the merits.

Johnson v. Combs, ____ F. Supp. ____ (N.D. Texas, Aug. 14, 1973)

- A. Civil Action No. CA-3-5055-D
- B. Counsel above
- C. Opinion, Hill, J., August 14, 1973

On August 14, 1973, the Northern District of Texas, Hill, J., awarded plaintiffs' counsel \$2,500 for work in the district court, and \$1,250 for processing the appeal.

200.53 - *Doherty v. Wilson*, 356 F. Supp. 35 (M.D. Ga. 1973)

A. Civil Action No. 748

B. Counsel for Plaintiff: Moore, Alexander & Rindskopf (Atlanta, Ga.)

Counsel for Defendants: Henry L. Crisp (Americus, Ga.)

C. Opinion, Owens, J., March 15, 1973

Suit under 42 U.S.C. § 1983, arising out of defendants' failure to hire plaintiff as a school teacher because of her residence in a communal farm. The court, Owens, J., ruled that the action could not proceed as a class action because plaintiff had failed to show that a proper class existed, but nonetheless granted injunctive relief and attorneys' fees, finding that "[t]he plaintiff was denied the job because she chose to exercise her constitutionally protected right of free association." The court ordered defendant Wilson to offer the plaintiff the "first available teaching position for which she is qualified," but refused to award money damages because of plaintiff's "lack of effort to find other employment."

The court also awarded plaintiff \$2,500.00 attorneys' fees:

"This court may in its discretion rule that defendants should be liable for plaintiff's attorneys fees where such action would be appropriate under the circumstances of the case. The court notes that in this case staff attorneys from the N.A.A.C.P. legal defense fund have been associated on this case. It is unlikely that much, if any, of the cost of this litigation is being borne by plaintiff.

"The court feels that justice in this case requires that the defendants, rather than plaintiffs, be liable for the legal costs of this action. Plaintiff is therefore awarded \$2,500.00 attorneys' fees and all costs, which amounts are to be paid by defendant Sumter County Board of Education."

200.54 - *United States v. Texas*, ____ F. Supp. ____ (E.D. Texas April 30, 1973)

A. Civil Action No. 5281

B. Counsel for Plaintiffs: OEO Legal Services (Dallas, Tex.)

C. Order, Justice, J., April 30, 1973

The United States brought suit to have the State of Texas enjoined from operating under a dual school system. The Eastern District of Texas, in *United States v. Texas*, 321 F. Supp. 1043 (E.D. Texas 1970), issued an order which prevented, among other things, transfer of students between school districts when such transfer would impede desegregation. Thereafter, 87 white students were denied transfer from the integrated Dallas Independent School District to the all-white Highland Park Independent School District. The affected students filed suit in state court alleging that they had a contract with Highland Park, which contract superseded the federal court order in *United States v. Texas*. The state court gave the white students a TRO.

Plaintiff-intervenor Tasby then sought to have the TRO issued by the state court set aside, and sought an injunction in the district court against further state court action. The district court issued such injunctions, and voided the state court's TRO. Plaintiff-intervenor thereafter sought attorneys' fees for his action in district court. The Eastern District of Texas, Justice, J., found that attorneys' fees should be awarded plaintiff-intervenor, even though he was represented by *OEO Legal Services*, relying not on the available rationale of obdurate obstinacy, but upon the private attorney general rationale:

"Although this court finds the requisite obstinacy in this case to support the award of attorneys' fees, recent decisions from this circuit indicate that congressional policy in enacting the civil rights statutes provides sufficient basis to require the award of attorneys' fees to successful plaintiffs in certain civil rights cases, even in the absence of a finding of obstinate conduct. . . .

"Defendants concede that an award of attorneys' fees under this court's equitable powers as outlined above can not be barred on the ground that the plaintiffs are represented by organization attorneys who do not look to the plaintiffs for payment. Two of plaintiffs' attorneys in the instant case are employed by the Dallas Legal Services Foundation Inc., funded at least in part by the United States Office of Economic Opportunity. . . ."

The court therefore awarded \$4,500 attorneys' fees, and \$234.63 costs, against defendants.

200.55 - *Gonzales v. Fairfax- Brewster School, Inc.*, ____ F. Supp. ____ (E.D. Va. July 27, 1973)

A. Civil Action No. 494-72-A, 495-72-A

B. Counsel for Plaintiffs: Allison W. Brown (Washington, D.C.)

C. Opinion & Order, Bryan, J., July 27, 1973

Suit under 42 U.S.C. § 1981, alleging racial discrimination by private schools. The Eastern District of Virginia, Bryan, J., found that the two private schools involved in the suit did indeed discriminate against blacks, and that, although neither school received any state or federal funding, state action was not necessary to invoke § 1981. The court enjoined defendants from further discriminating against blacks. It also awarded the named plaintiffs compensatory damages totaling \$5,500 for "embarrassment, humiliation and mental anguish," costs, and attorneys' fees of \$2,000, even though it found that "the defendants cannot be said to have acted recklessly or wilfully in disregard of clear existing law," because this was the first time private schools were held to be within the ambit of § 1981, and even though the case had not proceeded as a class action.

200.56 - *Stolberg v. Members of the Board of Trustees for the State Colleges of the State of Connecticut*, 474 F.2d 485 (2d Cir. 1973)

A. No. 217, Docket 72-1726

B. Counsel for Plaintiff-Appellant: Louis M. Winer (New Haven, Conn.)

Counsel for Defendant-Appellee: Sidney D. Giber (Hartford, Conn.)

C. Lumbard, Feinberg & Mansfield, JJ.

D. Opinion, Mansfield, J., January 29, 1973

Suit under 42 U.S.C. § 1983 alleging that the dismissal of an assistant professor at Southern Connecticut State College was a result of his exercise of his first amendment rights of free speech, and therefore constitutionally impermissible. The district court, Blumenfeld, J., found that plaintiff had indeed been dismissed because of his vocal opposition to the Vietnam War, and ordered him reinstated, with tenure, at no loss of seniority. In addition, the court awarded plaintiff \$9,000 compensatory damages -- the difference between his salary at his subsequent job and the one he would have received had he not been dismissed. The district court, however, denied plaintiff's claims for compensatory damages for humiliation and injury to his reputation, his claims for punitive damages, and his claims for attorneys' fees.

The second circuit, Mansfield, J., affirmed on the merits and affirmed as to the denial of additional compensatory and punitive damages, but reversed for assessment of attorneys' fees, holding that the district court had not been clearly erroneous in denying the additional monetary damages, but had applied the wrong standards in denying attorneys' fees:

"With respect to the issue of whether to award attorneys' fees, the emphasis is not placed solely on whether the defendants should suffer pecuniary punishment or be additionally deterred. Rather the objective is to assure that the plaintiff and others who might similarly be forced to great expense to vindicate clear constitutional claims, are not deterred from securing such vindication by the prospect of costly, protracted proceedings which have become necessary only because of the obdurate conduct of the defendants. . . .

"The circumstances of this case persuade us that an award of counsel fees is necessary to protect against the possibility that other faculty members might be reluctant to engage in activities protected by the First Amendment or might forgo the vindication of their rights to do so in a court of law. Such a result would be destructive of the educational process in a free society. When, as here, the constitutional right is one of great importance and proof of an intentional and serious violation is clear and definite, enforcement should not be inhibited by reason of litigation costs.

[Continued]

200.56 (Cont'd)

* * *

". . . Under these circumstances, where the constitutional rights of the appellant were clear at the time of the appellees' conduct, as well as at the time of suit, where the long course of vindication of those rights caused by the appellees should, as a consequence, have been unnecessary, and where the award of fees will help prevent inhibition of the future exercise of such rights at public institutions by other public employees, the financial burden of litigation should be removed 'from the shoulders of the plaintiff seeking to vindicate the public right.' *Knight v. Auciello*, 453 F.2d 852 (1st Cir. 1972)."

200.57 - *Cornist v. Richland Parish School Board*, ____ F. Supp. ____ (W.D. La. July 9, 1973)
Chisley v. Richland Parish School Board, ____ F. Supp. ____ (W.D. La. July 9, 1973)

A. Civil Actions No. 16,322 & 16,510

B. Counsel for Plaintiffs: Stanley Halpin (New Orleans, La.)

C. Opinion, Dawkins, J., July 9, 1973

Consolidated cases under 42 U.S.C. § 1983 alleging discrimination in the firing of two black school teachers. In April 1972 (amended May 1972), the court issued an order reinstating plaintiffs with full back pay, and took under advisement the question of attorneys' fees.

On July 9, 1973, the court awarded plaintiffs attorneys' fees, despite the fact that defendants had appealed the earlier decisions of April and May, finding that it had reserved the issue of attorneys' fees, which was therefore not involved in the appeal. "Further it would be patently unjust to require plaintiffs in these two consolidated actions to await any longer the full measure of relief [to] which they are so clearly entitled."

The district court, Dawkins, J., found the defendants

"... obdurately obstinate in their repeated attempts to dismiss these two plaintiffs. However, even in the lack of such bad faith, attorneys for plaintiffs would be entitled to fees in that they have acted as private attorney generals in securing the clear rights of plaintiffs in this case, which benefits not only the individual plaintiffs but all black teachers in Richland Parish as well as the school system as a whole by virtue of having been brought into compliance with clear federal law and congressional policy.

"Attorney's fees are certainly appropriate under the obstinacy standard of *Lee v. Southern Home Sites*, 429 F.2d 290 The panel in *Cooper* [v. *Allen*, 467 F.2d 836 (5th Cir. 1972)] noted that the Supreme Court construed Title II of the Civil Rights Act of 1964, which provides that the prevailing party is entitled to attorney's fees in the Court's 'discretion', to call for an award of fees as a matter of course unless special circumstances would render such an award unjust, *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), and it further noted that the Fifth Circuit had extended this doctrine to suits brought under 42 U.S.C. § 1982, citing *Lee I*, even though § 1982 makes no specific allowance for attorney's fees. The panel in *Cooper* found no relevant distinction between a § 1982 suit and a § 1981 suit, and extended the *Piggie Park* and *Southern Home Sites* doctrines to a § 1981 suit. It would be equally difficult to distinguish a § 1981 and § 1982 suit from a § 1983 suit, such as this one, in that regard. Indeed, in *NAACP v. Allen*, 340 F.

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200.57 (Cont'd)

Supp. 703 (M.D. Ala. 1972), Judge Johnson wrote that in successful § 1983 suits which effectuate strong congressional policy against discrimination an award of attorney's fees should be an integral part of the equitable relief and should not depend on a showing of defendant's bad faith.

"The benefit accruing to black educators and the Richland system as a whole from the successful prosecution of this suit is substantial and important. The litigation can be fairly characterized as *pro bono publico* on the part of plaintiff's counsel, and as Judge Johnson observed in *NAACP v. Allen*, *supra*, such litigation must be encouraged in order to vindicate the federal rights of our citizens.

"Indeed, in redistricting cases brought under § 1983, awards of attorney's fees have become practically a matter of course. . . . Further, on May 21, 1973 the United States Supreme Court in *Hall v. Cole*, 41 U.S.L.W. 4658 explicitly determined that attorney's fees may be awarded in cases in which the litigation confers a substantial benefit as well as in cases where the opponent has acted in bad faith. . . .

". . . It also should be noted that Congress has provided by § 718 of the Emergency School Aid Act (20 U.S.C. § 1617) for attorney's fees in proceedings necessary to bring about compliance with the prohibition against racial discrimination as it relates to elementary and secondary education. The Fifth Circuit in *Johnson v. Coombs*, No. 72-3030 (5th Cir., December 6, 1972) and the United States Supreme Court in *Northcross v. The Memphis Board of Education*, 41 U.S.L.W. 3635, June 5, 1973 (No. 72-1164) has [*sic*] held that § 718 is to be interpreted as in pari materia with Title II of the Civil Rights Act in that attorney's fees should be awarded ordinarily unless 'special circumstances would render such an award unjust.' Under § 718, this case which involves the dismissal of black educators for racially discriminatory reasons . . . would be an appropriate case for the award of attorney's fees. Since this Court relies upon nonstatutory grounds for its award of attorney's fees herein, it is unnecessary to reach the question of whether § 718 should be applied retroactively to the portion of the case which was prosecuted prior to the effective date of that Act. § 718 does clearly indicate a strong congressional policy to encourage individuals injured by racial discrimination to seek judicial relief. Considering the vast amount of work required of plaintiffs' counsel, his skill and diligence in prosecuting these cases, and the general difficulty inherent in this type of litigation, the Court considers an award of attorney's fees in the amount [of] \$3,750.00 in *Cornist* . . . and in the amount of \$3,750.00 in *Chisley* . . . for a total of \$7,500.00 reasonable."

200.58 - *Northercross v. Board of Education of the Memphis City Schools*,
412 U.S. 427 (1973)

A. No. 72-1164

B. Counsel for Petitioners: Ratner, Sugarmon & Lucas
(Memphis, Tenn.)

C. Opinion, per curiam, June 4, 1973

Class action to desegregate the schools of Memphis, Tennessee. The Sixth Circuit, without stating any reasons, denied plaintiffs' request for attorneys' fees. On certiorari, the Supreme Court vacated that portion of the Sixth Circuit's opinion dealing with attorneys' fees, and remanded.

In its opinion, the Court found that Section 718 of the Emergency School Aid Act of 1972, 20 U.S.C. § 1617, "tracks the wording of Title II of the Civil Rights Act of 1964." In *Newman v. Piggie Park Enterprises*, 390 U.S. 400, (1968), the Supreme Court had stated that "one who succeeds in obtaining an injunction under that Title should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." 390 U.S. at 402. In the instant case, the Court found that

"[t]he similarity of language in § 718 and [Title II] is, of course, a strong indication that the two statutes should be interpreted *pari passu*. Moreover, 'the two provisions share a common *raison d'être*. The plaintiffs in school cases are "private attorneys general" vindicating national policy in the same sense as are plaintiffs in Title II actions. The enactment of both provisions was for the same purpose -- "to encourage individuals injured by racial discrimination to seek judicial relief. . . ." *Johnson v. Combs*, ____ F.2d ____, ____ (5th Cir. 1972), quoting *Newman v. Piggie Park Enterprises, Inc.*, *supra*, at 402. We therefore conclude that, as with [Title II], if other requirements of § 718 are satisfied, the successful plaintiff 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'"

200.59 - *Adams v. Richardson*, 356 F. Supp. 92 (D.D.C. 1973)

- A. Civil Action No. 3095-70
- B. Counsel for Plaintiffs: Joseph L. Rauh, Jr. (Washington, D.C.)
Counsel for Defendants: Joseph Hannon (Washington, D.C.)
- C. Summary Judgment, Pratt, J., February 16, 1973

Suit against the Department of Health, Education and Welfare, alleging a failure on HEW's part to take appropriate action to desegregate schools receiving federal funds, in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d & 2000d-1. The District of Columbia District Court, Pratt, J., found HEW in violation of Title VI for continuing to make federal funds available to institutions of higher education, elementary and secondary schools, and vocational schools which were still segregated. The court ordered HEW to bring the segregated institutions into compliance with Title VI by instituting enforcement proceedings, either judicial or administrative, as specified by Title VI.

The court then stated that plaintiffs' counsel were entitled to costs and attorneys' fees under § 718 of the Emergency School Aid Act, 20 U.S.C. § 1617:

"Plaintiffs are awarded the costs of this action, including the costs of the depositions taken therein. Plaintiffs are entitled to an attorney's fee as part of the costs, pursuant to Public Law 92-318, Section 718 (86 Stat. 369), in an amount to be specified by further Order of this Court after appropriate proceedings."

* * *

Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973) (*en banc*)

- A. No. 73-1273
- B. Counsel for Appellees: Elliott C. Lichtman (Washington, D.C.)
Counsel for Appellants: Leonard Schaitman (Washington, D.C.)
- C. Bazelon, Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb & Wilkey, JJ.
- D. Opinion, per curiam, June 12, 1973

HEW appealed the above opinion to the District of Columbia Circuit, which affirmed, modifying to require less quick action with respect to colleges, as HEW was not accustomed to dealing with colleges, and this fact would "warrant a more deliberate opportunity to identify and accommodate" different factors involved in higher education.

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300.01 - *Lee v. Southern Home Sites*, 429 F.2d 290 (5th Cir. 1970)

A. No. 28167

B. Counsel for Appellants: Fred L. Banks, Jr., Reuben V. Anderson (Jackson, Miss.)
Jack Greenberg, Michael Davidson, William Bennett Turner, Norman C. Amaker (New York City)
Counsel for Appellees: George E. Morse, Eldon Bolton, Jr. (Gulfport, Miss.)

C. Coleman, Goldberg & Morgan, JJ.

D. Opinion, Coleman, J., July 13, 1970

The Southern District of Mississippi, Nixon, J., granted injunctive relief in a class action under 42 U.S.C. §§ 1981 and 1982, against a real estate company which had refused to sell lots to blacks. Plaintiffs appealed, stating that they had been granted inadequate relief, and seeking: publicity; compensatory damages; punitive damages; and attorneys' fees.

Because plaintiffs were allowed to purchase lots now valued at \$400 more than they were at the time they were offered for sale at only \$50, for the original offering price, the trial court's denial of compensatory damages was not in error.

The taxing of punitive or exemplary damages is within the discretion of the trial court, and the circuit court cannot rule that the court below erred in giving defendants "the benefit of any reasonable doubt," and in denying punitive damages.

As for attorneys' fees, the court stated:

"Section 1982 of Title 42, U.S.C.A., does not, by its terms, provide its own method of enforcement, nor does it expressly authorize the allowance of attorneys' fees, as do some of the more recent civil rights statutes. . . . However, the Supreme Court, while upholding Section 1982 as a valid exercise of congressional power under the Thirteenth Amendment in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 . . . stated in a footnote that:

"'The fact that 42 U.S.C. § 1982 is couched in declaratory terms and provides no explicit method of enforcement does not, of course, prevent a federal court from *fashioning an effective equitable remedy* . . . ' 392 U.S. at 414, n.13 (Emphasis added)."

[Continued]

300.01 [Cont'd]

The court also held there was ample authority for the district court, in its equitable discretion, to award fees, and remanded for further findings so that the court of appeals could adequately review the trial court's exercise of its discretion not to award attorneys' fees.

* * *

Lee v. Southern Home Sites, 444 F.2d 143 (5th Cir. 1971)

- A. No. 30738
- B. Counsel: See above
- C. Tuttle, Wisdom & Ingraham, JJ.
- D. Opinion, Wisdom, J., June 11, 1971

Appeal from the denial of attorneys' fees in the Southern District of Mississippi, after remand by the fifth circuit for consideration of fees. The district court, Nixon, J., had found that defendants had not been "unreasonably" or "obdurately obstinate," and had therefore denied attorneys' fees for an action alleging discrimination in property sales under 42 U.S.C. § 1982. Although *Jones v. Alfred H. Mayer Co.*, *supra*, was dispositive, the district court found that the defendants had not known of it when they sent the original letter which violated the law.

The fifth circuit found that the defendants had, in fact, been obstinate, merely by continuing the litigation:

"... [A]t the time the complaint was served, the defendant was put on notice of Section 1982. Certainly, three months later, when the defendant's counsel filed his answer he must have known of *Jones v. Alfred H. Mayer Co.* Continued litigation of the merits of the claim was 'unreasonable, obdurate obstinacy.'"

The court went on, however, to base its decision awarding fees "on a broader ground." "We hold that attorneys' fees are part of the effective remedy a court should fashion to carry out the congressional policy embodied in Section 1982." Although § 1982 states no remedies (other than declaratory relief), the Supreme Court has held that courts have a duty to carry out the intent of Congress by fashioning effective remedies. See *Jones v. Alfred H. Mayer Co.*, *supra*; *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964).

In *Mills v. Electric Auto Lite Co.*, 396 U.S. 375 (1970), "the Court's decision [to award attorneys' fees in a derivative stockholders' suit] . . . rest[ed] heavily on its acknowledgment of 'overriding considerations,' that

[Continued]

300.01 [Cont'd]

private suits are necessary to effectuate congressional policy and that awards of attorneys' fees are necessary to encourage private litigants to initiate such suits."

In *Fleishman Corp. v. Maier Brewing Co.*, 336 U.S. 714 (1967), the Supreme Court stated that attorneys' fees should *not* be awarded in patent cases, but in so doing stated that the statute regarding patents was explicit in granting certain forms of relief (including compensatory and treble damages), and it therefore implicitly prohibited an award of attorneys' fees.

"Section 1982 is not a statute providing detailed remedies, and thus the policy of effectuating congressional purpose does not militate against an award of attorney's fees. Additionally, here as in *Mills* there is a strong congressional policy behind the rights declared in § 1982. Awarding attorneys' fees to successful plaintiffs would facilitate the enforcement of that policy through private litigation."

The Fair Housing Law, 42 U.S.C. § 3612(c), is closely related to § 1982. "[I]n fashioning an effective remedy for the rights declared by Congress one hundred years ago, courts should look not only to the policy of the enacting Congress but also to the policy embodied in closely related legislation. Courts work interstitially in an area such as this." The Fair Housing Law provides for attorneys' fees.

". . . [T]he effective remedy for securing the rights declared in § 1982 should include the award of attorneys' fees to successful plaintiffs such as provided in the Fair Housing Law, 42 U.S.C. § 3612(c). The same policies supporting Congress' provision for attorney's fees in that statute apply to fair housing suits under § 1982."

"We think the factors relied on in *Piggie Park* in interpreting the provision for awarding attorney's fees apply also to suits under § 1982. The policy against discrimination in the sale or rental of property is equally strong. The statute, under present judicial development, depends entirely on private enforcement. Although damages may be available . . . in many cases there may be no damages or damages difficult to prove. To ensure that individual litigants are willing to act as 'private attorneys general' to effectuate the public purposes of the statute, attorney's fees should be as available as under 42 U.S.C. § 3612(c)."

Remanded for assessment of fees.

300.02 - *Morrow v. Crisler*, ____ F. Supp. ____ (S.D. Miss. Sept. 29, 1971)

- A. Civil Action No. 4716
- B. Counsel for Plaintiffs: Frank R. Parker (Jackson)
- C. Opinion, Nixon, J., September 29, 1971

Class action on behalf of blacks in Mississippi who had been, or would be, denied employment by the Mississippi Highway Safety Patrol and the Mississippi Department of Public Safety on the basis of race. Plaintiffs sought relief under 42 U.S.C. §§ 1981 and 1983, and Title VI of the Civil Rights Act of 1964.

The court, Nixon, J., found that the Highway Patrol had been all white since its inception.

"Where the statistical disparities are great, it is unnecessary in establishing a prima facie case of racial discrimination that there be shown a conscious or intentional failure by the defendant officials to carry out the duties of their office or that the officials consciously and intentionally discriminated or acted from ill will or evil motives or that they lacked good faith. The absence of any substantial number of Black employees in state or state-connected institutions raises a presumption of discrimination against Blacks who have sufficient qualifications but have been denied employment." [Citations omitted.]

Although the court found that this discrimination had been unintentional, it granted (1) an injunction against all discrimination by defendants; (2) a five-year freeze on job qualifications; (3) an injunction requiring defendants to publicize openings and recruit heavily in black areas; and (4) a requirement that records be kept by defendants to show enforcement of the court's order.

The court also granted attorneys' fees of \$500 to plaintiffs, and on November 30, 1971, increased that award to \$3,000.

300.03 - *Brown v. Ballas*, 331 F. Supp. 1033 (N.D. Tex. 1971)

A. Civil Action No. CA 3-3886-C

B. Counsel for Plaintiff: James C. Barber (Dallas, Tex.)
Counsel for Defendants: Sol Ballas (Dallas, Tex.)

C. Taylor, J.

D. Opinion, June 9, 1971

Class action under 42 U.S.C. § 1982 and the Fair Housing Act of 1968, 42 U.S.C. §§ 3601 - 3619, seeking damages and injunctive relief against realtor who allegedly discriminated in renting residential property.

The Northern District of Texas, Taylor, J., granted injunctive relief under 42 U.S.C. § 3610, but held that actual or punitive damages and attorneys' fees could not be recovered under 42 U.S.C. § 3612 because plaintiff had not timely filed under the latter section of the Fair Housing Act.

Citing *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969) ^{*/} and *Lee v. Southern Home Sites Corp.*, *supra*, the court found that compensatory and punitive damages and attorneys' fees could be awarded under 42 U.S.C. § 1982, and awarded plaintiff \$750 in actual damages but, in the absence of bad faith, no punitive damages.

"The court also considers an award of attorney's fees to be appropriate here '. . . especially so when one considers that much of the elimination of unlawful racial discrimination necessarily devolves upon private litigants and their attorneys.' *Lee v. Southern Home Sites Corp.*, 429 F.2d 290 at 295. Attorney for plaintiff is awarded \$500.00. While this may not fully compensate for the amount of work done, the award must be considered in light of the amount of damages awarded to the plaintiff. . . ."

^{*/} "The existence of a statutory right implies the existence of all necessary and appropriate remedies.

* * *

"A disregard of the command of the statute is a wrongful act and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied"

396 U.S. 229, 239 (1969)

300.04 - *Kerr v. City of Chicago*, 424 F.2d 1134 (7th Cir. 1970)

A. No. 17345

B. Counsel for Appellant: Elmer Gertz (Chicago)
Counsel for Appellees: Raymond F. Simon, Edmund Hatfield (Chicago)

C. Cummings, Kerner & Grant, JJ.

D. Opinion, Kerner, J., March 11, 1970

In this case the court held that attorneys' fees expended by a state criminal defendant could be recovered as damages under 42 U.S.C. § 1983, if it were shown that the prosecution of the state criminal case violated the criminal defendant's civil rights.

Plaintiff, a black minor, sued under 42 U.S.C. §§ 1983 and 1988, for damages, alleging that his civil rights had been violated by an 18-month detention, without bail, after an illegally obtained confession to murder and burglary. The court of appeals held that the district court had erred in its instructions to the jury, and remanded for a new trial. At this new trial, the plaintiff should be allowed, said the circuit court, to introduce, as an element of damages, evidence of attorneys' fees paid by him.

"The defendants . . . contend that attorneys' fees expended in a criminal action are not recoverable in a civil rights action. We disagree. . . . A plaintiff in a civil rights action should be allowed to recover the attorneys' fees in a state criminal action where the expenditure is a foreseeable result of the acts of the defendant." 424 F.2d 1141 (Citations omitted.).

At the new trial, the jury found for the defendants (and thus did not reach the question of attorneys' fees), and the plaintiffs have again appealed.

300.05 - *Stacy v. Williams*, 50 F.R.D. 52 (N.D. Miss. 1970)(three-judge court), *aff'd*, 446 F.2d 1366 (5th Cir. 1971)

A. Nos. WC 6725-K, WC 6837-K

B. Counsel for Plaintiffs: J. Wesley Watkins, Eugene M. Bogen, James L. Robertson
(Greenville, Miss.)

Counsel for Defendants: James Rankin (Jackson, Miss.)
M.M. Roberts (Hattiesburg, Miss.)

C. Coleman, Russell & Keady, JJ.

D. Opinion, per curiam, April 16, 1970

Plaintiffs' attorneys in an action challenging the constitutionality of a "speaker ban" policy at the University of Mississippi sought attorneys' fees of \$18,280, to be taxed against the Board of Trustees of Institutions of Higher Learning. The defendant Board claimed that, under State law, it, as an agency of the State, could be taxed neither costs nor attorneys' fees. The defendant Board also claimed that attorneys' fees were not requested until two months after entry of judgment, and that, therefore, the court could not entertain the request.

The court ruled that Rule 54(d), Fed. R. Civ. P., allowed it to tax costs against the defendant Board despite the state statute, and it therefore taxed costs against the Board, but refused plaintiffs' request to include attorneys' fees as taxable costs under 28 U.S.C. § 1920.

The court also ruled that, because attorneys' fees would be "new substantive relief" rather than correction of a clerical or other error (the court's original opinion and order had not mentioned attorneys' fees), Rule 59(e), Fed. R. Civ. P., would have to be complied with in order for the court to consider an allowance of such fees. Because plaintiffs did *not* comply with Rule 59(e) time limitations, plaintiffs' motion to amend the court's judgment by taxing attorneys' fees was denied.

300.06 - *Haining v. Roberts*, 320 F. Supp. 1054 (S.D. Miss. 1970)
(three-judge court)

A. Civil Action No. 4594

B. Counsel for Plaintiffs: A. Spencer Gilbert (Jackson,
Miss.)
Counsel for Defendants: M.M. Roberts (Hattiesburg,
Miss.), James E. Rankin
(Jackson, Miss.)

C. Clark, Cox & Nixon, JJ.

D. Opinion, Nixon, J., December 29, 1970

In a decision declaring unconstitutional Mississippi's Subversive Activities Act and reinstating a state employee who had refused to sign the state's loyalty oath, the three-judge court found that the defendants had not been "malicious, oppressive, or so 'unreasonable and obdurately obstinate' as to warrant an award for attorney's fees," and therefore taxed only court costs against the defendants.

Although the loyalty oath in question was virtually identical to one outlawed by the Supreme Court several years earlier, the district court held that the defendants had nonetheless acted in good faith in using the oath because, as the court found, the defendants were not aware of the Supreme Court decision when they discharged the employee. [This approach, used by the same district court in denying attorneys' fees in *Lee v. Southern Home Sites*, no. 300.01, *supra*, was rejected by the fifth circuit in *Lee*.]

An appeal to the fifth circuit was dismissed on the ground that the appeal should have been directly to the Supreme Court. A petition for certiorari was filed in March 1972.

300.07 - *Terry v. Elmwood Cemetery*, 307 F. Supp. 369 (N.D. Ala. 1969)

A. Civ. Act. No. 69-490

B. Counsel for Plaintiffs: James K. Baker (Birmingham, Ala.), Jack Greenberg, Norman Amaker, James Nabrit (New York City)

Counsel for Defendants: Sydney Lavender (Birmingham, Ala.)

C. Opinion, December 22, 1969, Lynne, C.J.

Class action for damages and declaratory and injunctive relief under 42 U.S.C. § 1982, against the operator of a cemetery who refused to bury black soldier on the grounds that the cemetery's rules included a racially restrictive covenant. The court held the cemetery's action unconstitutional, and, in a later, unreported, order, awarded plaintiffs' counsel \$2,500 in attorneys' fees.

300.08 - *Newbern v. Lake Lorelei, Inc.*, 308 F. Supp. 407 (S.D. Ohio 1968)

A. Civ. Act. No. 6871

B. Counsel for Plaintiffs: Norris Muldrow, Peter J.
Randolph (Cincinnati, Ohio)
Counsel for Defendants: Ambrose H. Lindhorst, James
L. O'Connell, John A. Lloyd,
Jr. (Cincinnati, Ohio)

C. Opinion, Hogan, J., November 14, 1968

Class action under 42 U.S.C. § 1982 for injunctive relief against company which refused to sell land to black applicants. In a later, unreported order, the court awarded plaintiffs' counsel \$1,000 attorneys' fees.

300.09 - *Knight v. Auciello*, ____ F.2d ____ (1st Cir., Jan. 17, 1972)

A. No. 71-1108

B. Counsel for Appellants: Michael Davidson, Jack Greenberg, Sylvia Drew, Gerald L. Nissenbaum

C. Aldrich, McEntee, & Wyzanski, JJ.

D. Opinion, Per Curiam, January 17, 1972

Appeal from a denial of attorneys' fees in a suit under 42 U.S.C. § 1982, alleging discrimination in renting apartments. Plaintiffs below were awarded \$500 general damages, but the District of Massachusetts refused to award attorneys' fees. The first circuit held that the court below had erred, and remanded for an award of attorneys' fees. It also taxed as costs against appellees attorneys' fees for bringing the appeal.

"The violation of an important public policy may involve little by way of actual damages, so far as a single individual is concerned, or little in comparison with the cost of vindication, as the case at bar illustrates. If a defendant may feel that the cost of litigation, and, particularly, that the financial circumstances of an injured party may mean that the chances of suit being brought or continued in the face of opposition, will be small, there will be little brake upon deliberate wrongdoing. In such instances public policy may suggest an award of costs that will remove the burden from the shoulders of the plaintiff seeking to vindicate the public right. We regard this as such a case. . . .

"As to the amount of the fee, it might be thought appropriate to compare with the schedule set in the Criminal Justice Act, 18 U.S.C. § 3006A(d), without the maximum limitation, but we leave such matters to the district court. . . ." [Footnotes and citations omitted].

300.10 - *Peoples v. Doughtie*, ____ F. Supp. ____ (M.D. Ala. Nov. 19, 1971)

A. No. 1150-S

B. Opinion, Johnson, J., November 19, 1971

A suit under 42 U.S.C. § 1982 for discrimination in apartment rentals.

The Middle District of Alabama, Johnson, J., awarded plaintiffs \$750 compensatory damages (although monetary loss and expenses were small, plaintiffs suffered embarrassment and humiliation); \$1,000 punitive damages ("for the purpose of punishment and for the purpose of deterring others in like conduct"); and reasonable attorneys' fees. The court stated that the defendants' argument that plaintiffs were financially able to pay their lawyers was not persuasive, as it is the Fair Housing Act, and not 42 U.S.C. § 1982, which requires a determination of plaintiffs' ability to pay prior to assessing attorneys' fees.

300.11 - *Pegues v. Bakane*, ____ F.2d ____ (5th Cir. July 27, 1971)

A. No. 30375

B. Brown, Clark & Coleman, JJ.

C. Opinion, Coleman, J., July 27, 1971

Appeal from the Northern District of Alabama, which had denied a preliminary injunction against defendants in a suit alleging discrimination in the sale of houses under 42 U.S.C. §§ 1981 and 1982 and § 804(a) of the Fair Housing Act of 1968, on the ground that plaintiffs had not proved they were entitled to relief. Defendants had offered the property in dispute for sale to plaintiffs the day after the instant appeal was filed, and the fifth circuit therefore dismissed the appeal as moot.

As to damages and attorneys' fees, the fifth circuit stated that these issues were not mooted by plaintiffs' acquisition of the property, but that the record failed to show discrimination against or damage to plaintiffs. Citing *Lee v. Southern Home Sites Corp.*, No. 300.01, *supra*, the fifth circuit indicated that attorneys' fees should have been awarded in the case had the plaintiffs met their burden of proof.

300.12 - *Hammond v. Housing Authority & Urban Renewal Agency of Lane County, Oregon*, 328 F. Supp. 586 (D. Oregon 1971)

A. Civil Nos. 70-264, 70-265

B. Counsel for Plaintiffs: Robert L. Ackerman (Springfield, Oregon)
 Counsel for Defendants: Miller, Moulton & Andrews (Eugene, Oregon)

C. Opinion, Goodwin, J., April 2, 1971

Suit under 42 U.S.C. § 1983, alleging that defendants violated the equal protection clause of the fourteenth amendment by fixing rentals for welfare recipients at a higher rate than for non-welfare recipients who had the same income. The district court, Goodwin, J., ruled that the rent schedules were arbitrary and a violation of the fourteenth amendment, but found injunctive relief inappropriate as defendants had already voluntarily adopted unitary rent schedules. It also found that plaintiffs had "proven no substantial damage," but had "incurred substantial expenses in bringing this litigation," and therefore awarded attorneys' fees of \$1,000.

300.13 - NAACP v. Allen, ____ F. Supp. ____ (M.D. Ala. March 24, 1972)

A. Civil Action No. 3561-N

B. Counsel for Plaintiffs: Morris Dees, Joseph J. Levin
(Montgomery, Ala.)

C. Opinion, Johnson, J., March 24, 1972

In a suit under 42 U.S.C. § 1983 to desegregate the Alabama Department of Public Safety and the Highway Patrol, the court awarded plaintiffs \$889.67 costs and \$3,500 attorneys' fees.

Defendants argued that attorneys' fees should not be awarded, as there was no showing of bad faith on their part. The court found, however, that the all-white composition of the Department and Patrol

"... constitute[s] a substantial showing by plaintiffs of bad faith on the part of defendants and their predecessors in office. In addition, because the constitutional principles applicable to the case *sub judice* were clear long before this suit was filed . . . and because defendants unquestionably knew and understood that their discriminatory practices violated the Fourteenth Amendment to the United States Constitution, their defense of this lawsuit amounts to unreasonable and obdurate conduct which necessitated the expense of litigation. Consequently, because of defendants' bad faith, this case is an appropriate one for the awarding of a reasonable attorneys' fee.

"This Court, however, feels that the attorneys' fee award should be premised on a broader basis than defendants' bad faith. When plaintiffs, through the prosecution of a lawsuit, benefit the class they represent and effectuate a strong congressional policy, they are entitled to attorneys' fees regardless of defendants' good or bad faith. Indeed, under such circumstances, the award loses much of its discretionary character and becomes a part of the effective remedy a court should fashion to encourage public-minded suits and to carry out congressional policy.

"In the present case, the benefit accruing to plaintiffs' class is substantial and important. Employment discrimination based upon race is reprehensible on any level, and especially so when practiced by state government. Those plaintiffs acting in the capacity of private attorneys general, who establish the existence of such discrimination by a state agency and who, through litiga-

[Continued]

300.13 (Cont'd)

tion, procure relief from its onerous effects, not only provide the members of their class with added employment opportunities, but also relieve them of the badge of opprobrium which necessarily attaches to a group discriminatorily excluded, solely by reason of their race, from particular fields of endeavor.

"In addition, congressional policy strongly favors the vindication of federal rights violated under color of state law, 42 U.S.C. § 1983,^{7/} and, more specifically, the enforcement and protection of the right to equal job opportunities, 42 U.S.C. §§ 2000e, e-1 to e-15.^{8/} Surely, this congressional policy is as compelling as that embodied in 42 U.S.C. § 1982 and given effect by an award of attorneys' fees in *Lee v. Southern Home Sites*, *supra*. Consequently, because the benefit to plaintiffs' class is significant, and because, in bringing this suit, plaintiffs have promoted the purposes of congressional legislation, the case *sub judice* clearly falls among those meant to be encouraged under the principles articulated in *Piggie Park Enterprises, Inc.* and *Mills* and expanded upon in *Southern Home Sites* and *Bradley v. School Bd. of Richmond*.

"^{7/} With regard to an award of attorneys' fees, it is of no consequence that 42 U.S.C. § 1983, the statute under which plaintiffs filed this suit, is silent on the availability of such an award. *See Long v. Georgia Kraft Co.*, Civil No. 71-1476, 5th Cir., Jan. 28, 1972, and the many cases cited therein; *Knight v. Auciello*, 40 U.S.L. Week 2453 (1st Cir. Jan. 17, 1972).

"^{8/} Title VII of the Civil Rights Act of 1964 provides for the allowance of a reasonable attorneys' fee. Consequently, had the state officials involved in this case been subject to suit under Title VII, they also would have been exposed to liability for attorneys' fees. This Court sees no justification for holding state governments to lower standards than are required of private employers, nor for subjecting them to any less liability than that to which private employers are exposed. The same policies supporting a grant of attorneys' fees in Title VII cases apply to employment discrimination cases brought under 42 U.S.C. §§ 1981, 1983.

[Continued]

300.13 (Cont'd)

"Other circumstances also render an allowance of attorneys' fees appropriate. The prosecution of the kind of case involved here, like that of the desegregation suits described in *Bradley*, 'is an enterprise on which any private individual should shudder to embark.' Because the probability of a large damage recovery is remote, absent court-awarded attorneys' fees, plaintiffs or their lawyers who bring class actions seeking to preserve civil liberties usually must make substantial financial sacrifices. In addition, a lawyer representing black plaintiffs in an employment discrimination case, or in any civil rights litigation, is likely to suffer social, political and community ostracism. This likelihood is multiplied, of course, in a case such as the present one in which plaintiffs have sued high-ranking state officials and have alleged and proved racial discrimination. Even more damaging to an attorney involved in such litigation is the probability that he will be estranged from other members of his profession who are unwilling to participate in, or even lend moral support to, suits seeking to vindicate the public good. Because of these factors and the paucity of damage awards in civil rights suits, private plaintiffs and lawyers generally spurn involvement with them. Consequently, as pointed out in *Sims v. Amos*, in order to encourage *pro bono publico* litigation and to carry out congressional policy, an award of attorneys' fees is essential."

300.14 - *Pina v. Homsí*, ____ F. Supp. ____ (D. Mass. July 9, 1969)

A. Civ. A. No. 69-666-G

B. Counsel for Plaintiffs: Joseph Steinfield (Boston; Mass.)

Counsel for Defendants: Paul V. Salter, Harold Krasnow (Boston, Mass.)

C. Opinion, Garrity, J., July 9, 1969

Suit alleging racial discrimination in the rental of housing under 42 U.S.C. § 1982. The District of Massachusetts, Garrity, J., awarded plaintiffs damages in the amount of \$1,052.60, including attorneys' fees of \$350.

"That may not seem like a large fee in the light of the hours spent by Mr. Steinfield in the case, although I do not know that it is a small fee either, but this award of attorneys' fees is not a finding by the Court as to the reasonable value of Mr. Steinfield's services. I do not undertake to rule upon the reasonable value of his services. I simply rule that only to the extent of . . . \$350 . . . is that amount properly chargeable to the defendant Homsí. That means that Mr. Steinfield's bill might properly be greater than that amount or that the reasonable value of his services might be greater than the amount awarded, but the question here is what amount is properly chargeable under the circumstances to the defendant.

"On that issue, I consider relevant the offer made, at least by June 20th, if not earlier, by Mr. Homsí to rent this apartment to the Pinás. I do not for a moment conclude that the Pinás were in any sense obligated to accept his offer or that they were in any way unwarranted or unjustified in determining that they would prefer to live elsewhere than in Mr. Homsí's apartment. However, in view of the time spent, the pleadings spent, the complexity of this matter, and the ability with which Mr. Steinfield has conducted the case, I award, as I say, a total attorney's fee of \$350 . . ."

300.15 - *Lyle v. Teresi*, 327 F. Supp. 683 (D. Minn. 1971)

A. No. 4-69-Civ.-306

B. Counsel for Plaintiff: William Merlin (Minneapolis, Minn.)
Counsel for Defendants: Harold C. Evarts, Robert M. Skare, Allen D. Barnard (Minneapolis, Minn.)

C. Opinion, Neville, J., April 17, 1971

Suit under 42 U.S.C. § 1983 charging harrasment by police officials of black musician who was stopped by police nine times in a nine-month period, allegedly without reason. A jury returned a verdict against the defendants, and awarded the plaintiff \$4,000 damages.

Ruling on plaintiff's request for attorneys' fees, the District of Minnesota, Neville, J., stated:

"Section 1983 has no provision for allowance of attorneys fees. There is a line of cases, however, where attorneys fees have been awarded to a successful civil rights litigant where the action has been brought under § 1983. For the most part these authorities relate to racial discrimination in educational institutions, but they are none the less Section 1983 cases and fees are allowed in the court's discretion. They are allowed not simply to penalize litigants, but to encourage individuals injured by racial discrimination to seek judicial relief.

* * *

"[T]he same arguments [the 'private attorneys general' concept and advancement of the public interest] pervade the Section 1983 decisions allowing attorney fees despite the lack of express statutory authority therefor. The court feels that a reasonable attorney's fee should be allowed in this case.

". . . Defendants' counsel stated in open court that plaintiff's counsel had been retained by plaintiff on a contingent fee basis, which was not denied. The court observed that plaintiff's counsel undertook and proceeded with the case with vigor and ingenuity, granted that some of his efforts including a number of pretrial motions were abortive and perhaps ill advised. Though he represented his client well and with sincerity, the court cannot possibly award plaintiff any such amount as he is requesting [\$11,280 for

[Continued]

300.15 (Cont'd)

10 1/2 days trial time, 53 1/4 hours preparation time, and 200 hours of a young associate's time]. Having in mind the size of the verdict, the services rendered, the defenses raised and all the circumstances, the court allows plaintiff an attorney's fee of \$1,000, to be added to the present judgment. As to out-of-pocket expenses, those which can be taxed as costs ought to be so treated; no allowance for such otherwise can be made."

300.16 - *Ojeda v. Hackney*, 452 F.2d 947 (5th Cir. 1972)

A. No. 71-1669

B. Counsel for Appellant: R. M. Helton (Wichita Falls, Texas)

Counsel for Appellees: Crawford Martin, Pat Bailey
(Austin, Texas)

C. Thornberry, Morgan & Clark, JJ.

D. Opinion, Per Curiam, January 5, 1972

Appeal of the Northern District of Texas' denial of attorneys' fees in a suit which established the right of a class of some 22,000 welfare recipients to recover, retroactively, \$2,519,000 in welfare benefits. Plaintiff below had contracted with her attorney to pay 25 percent of her recovery as legal fees, but the attorney, claiming he had secured monetary benefits for the entire class he represented, and it would therefore be unfair to require the named plaintiff to shoulder the whole burden, sought attorneys' fees of from three to five percent of the monetary "fund" created by his efforts.

Defendants countered that: (1) a similar class action had been filed shortly after the instant suit, and plaintiff's attorney could not therefore claim to represent, and recover from, the entire class; (2) payment of AFDC funds to plaintiff's attorney would violate various provisions of Texas law; (3) deduction of a percentage of AFDC funds from individual recipients for payment of attorneys' fees would violate federal laws prohibiting requiring a welfare recipient to spend his grant in a certain manner; and (4) some of the "fund" created had already been disbursed, thereby making assessment of fees impossible.

The Northern District of Texas, Hughes, J., dismissed, without prejudice, plaintiff's Motion for Attorneys' Fees, stating

"... the attorney for the Plaintiffs . . . performed legal services in his conduct of representing the Plaintiffs . . . in the amount of Ten Thousand . . . Dollars (\$10,000.00); however, the Court is of the opinion and hereby finds that there is no way under presently existing laws that the attorney for the Plaintiffs can be awarded attorneys' fees payable by the State of Texas or the Texas Department of Public Welfare. . . ."

On appeal, the Fifth Circuit vacated the judgment and remanded, stating:

"On this appeal appellant contends that the district judge, as a federal chancellor, possesses an equitable discretion to award attorneys' fees in a class action

[Continued]

300.16 (Cont'd)

suit despite the provisions of State legal restraints. We agree. The matter is committed to the unfettered discretion of the district judge.

". . . [T]he district judge may have incorrectly conceived that the State legal proscriptions deprived the court of such discretion. If this is true, this court cannot determine in the first instance how the district judge would exercise such discretion."

The circuit court also gave some "general observations" to guide the district court on remand:

"It would initially be important to determine whether or not all or any part of these public funds have been disbursed by the State to the claimants. If they have not, the district court in its discretion could certainly order the State to pay the monies belonging to these claimants in a manner which would assure payment of the attorneys' fees before the claimants' funds are disbursed to widely scattered and probably insolvent individuals. The district court may deem equity requires that the claimants pay their pro rata share of his fee from their resources if some equitable means to accomplish this can be concocted. We do however agree with the State of Texas that, if the funds payable to these principals have been paid out, the attorney may not obtain his fees from those funds appropriated solely to administer the Texas Welfare Department as the appellant's attorney contended. Quite another problem would be presented if it turns out that a part, but not all, of the funds have been paid out to claimants, since it would be patently unfair to require only those claimants whose share of the funds remains undisbursed to bear the entire brunt of the payment of such fees. Of course, if any payments have been made to claimants the district court may decide that the attorney was not diligent in promptly raising the issue of his entitlement to fees when the order requiring payment was first entered and that equity should not come to his aid now."

300.17 - *Wyatt v. Stickney*, ____ F. Supp. ____, ____ F. Supp. ____
(M.D. Ala. April 13, 1972)

A. No. 3195-N

B. Counsel for Plaintiffs: George W. Dean, Jr. (Destin,
Fla.)

Counsel for Defendants: Joseph D. Phelps, Jerry Wood
(Montgomery, Ala.)

C. Order & Decree, Johnson, J., April 13, 1972

Class action alleging that the treatment afforded the mentally ill and retarded involuntarily committed to institutions in Alabama failed to meet minimum medical and constitutional standards. The Middle District of Alabama, Johnson, J., treated the case in two separate decrees: one dealing with Partlow State School and Hospital (for the mentally retarded) (No. A, below); and the other dealing with Bryce Hospital and Searcy Hospital (for the mentally ill) (No. B, below).

* * *

A. *Wyatt v. Stickney*, ____ F. Supp. ____ (M.D. Ala. April 13, 1972)

A. No. 3195-N

B. Counsel for Plaintiffs: George W. Dean, Jr. (Destin,
Fla.)

Counsel for Defendants: Joseph D. Phelps, Jerry Wood
(Montgomery, Ala.)

-C. Order & Decree, Johnson, J., April 13, 1972

Class action alleging that the treatment afforded the mentally retarded in Partlow State School and Hospital failed to meet minimum medical and constitutional standards. The court found that:

"... people involuntarily committed through noncriminal procedures to institutions for the mentally retarded have a constitutional right to receive such individual habilitation as will give each of them a realistic opportunity to lead a more useful and meaningful life and to return to society."

The court then found that "conditions at Partlow are grossly substandard," a fact to which defendants "... [c]ommendably ... offered no rebuttal."

The court ordered the implementation of minimum medical and constitutional standards at Partlow, emphasizing that "these standards are, indeed, minimums only peripherally approaching the ideal to which defendants should aspire."

[Continued]

300.17 (Cont'd)

The court stated that a lack of operating funds would not justify delay in implementation of such standards.

To aid in the implementation of the new standards, the court appointed a seven-member "standing human rights committee to guarantee that residents are afforded constitutional and humane habilitation." The human rights committee was to, among other duties, hear complaints of residents and oversee the programs of the hospital.

Because "[f]ederal courts are reluctant to assume control of any organization, but especially one operated by a state," the court reserved ruling on plaintiffs' request for appointment of a special master and professional advisory committee to "oversee the implementation of minimum constitutional standards" at Partlow. For the same reason, it reserved ruling on plaintiffs' request that the State be enjoined from spending any funds on "nonessential functions of the state" and that the State be ordered to "sell or encumber portions of its extensive land holdings," so as to ensure adequate money for implementation of the court's order. If, however, the State failed to implement the court-ordered changes itself, the court warned that "affirmative steps, including appointing a master," would be taken, "to ensure that proper funding is realized and that adequate habilitation is available for the mentally retarded of Alabama."

As additional relief, the court stated that attorneys' fees would be awarded successful plaintiffs. "The basis for the award and the amount thereof will be considered and treated in a separate order."

* * *

B. *Wyatt v. Stickney*, ____ F. Supp. ____ (M.D. Ala. April 13, 1972)

A. No. 3195-N

B. Counsel for Plaintiff: George W. Dean, Jr. (Destin, Fla.)

Counsel for Defendants: Joseph D. Phelps, Jerry Wood
(Montgomery, Alabama)

C. Order & Decree, Johnson, J., April 13, 1972

Separate part of the same suit treated in 300.17(A), immediately above, wherein the same results were reached for Bryce Hospital and Searcy Hospital as for Partlow State School and Hospital, for the same stated reasons.

The only difference in the two decrees, aside from some changes in language, was that in this portion of the suit the plaintiffs had asked that the state be enjoined from committing anyone else to Bryce and Searcy Hospitals until "such time as adequate treatment is supplied in those hospitals." The court denied the plaintiffs' request, on the ground that ". . . because of the alterna-

[Continued]

300.17 (Cont'd)

tives to commitment commonly utilized in Alabama, as well as in other states, the Court is fearful that granting plaintiffs' request at the present time would serve only to punish and further deprive Alabama's mentally ill."

As in the first portion of the case, the court ruled that attorneys' fees would be awarded successful plaintiffs, with "[t]he basis for the award and the amount thereof . . . considered and treated in a separate order."

* * *

Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972)

A. Civil Action No. 3195-N

B. Counsel, *supra*

In considering an award of attorneys' fees for prosecution of the above cases, the Middle District of Alabama, Johnson, J., found that had 'faith was present because of defendants' failure to upgrade the facilities involved prior to institution of the suits, but awarded fees on the benefit, or private attorney general, theory:

"Plaintiffs bringing suits to enforce a strong national policy often benefit a class of people far broader than those actually involved in the litigation. Such plaintiffs, who are said to act as 'private attorneys general,' rarely recover significant damage awards. Moreover, if a violation of civil rights is alleged or if some other challenge to constituted authority is involved, these plaintiffs and their attorneys may confront other, more personal obstacles to the maintenance of their public-minded suits. Consequently, in order to eliminate the impediments to *pro bono publico* litigation and to carry out congressional policy, an award of attorneys' fees not only is essential but also is legally required."

* * *

"Despite plaintiffs' having benefitted so many people, however, they neither sought nor recovered any damages. Nevertheless, the expenses they incurred in vindicating the public good were considerable. To burden only plaintiffs with these costs not only is unfair but also is legally impermissible." [Citations omitted.]

The court awarded a total of \$36,754.62 paid plaintiffs' three attorneys, using as a guide the Criminal Justice Act's provision for \$20 per hour for out-of-court work and \$30 per hour for in-court work:

[Cont'd]

300.17 (Cont'd)

"Factors relevant to the Court's determination generally are the same as those covering grants of attorneys' fees in commercial cases. They include the intricacy of the case and the difficulty of proof, the time reasonably expended in the preparation and trial of the case, the degree of competence displayed by the attorneys seeking compensation and the measure of success achieved by these attorneys. In public interest cases, courts also should consider the benefit inuring to the public, the personal hardships that bringing this kind of litigation causes plaintiffs and their lawyers, and the added responsibility of representing a class rather than only individual plaintiffs.

". . . Plaintiffs' attorneys have navigated through a heretofore uncharted course and, in the process, have helped establish minimum constitutional standards for mental health institutions. These attorneys have exhibited professional conscientiousness throughout the litigation, and their toil, along with that of others, has culminated in an incalculable benefit to the people of Alabama.

* * *

"In attempting to determine what is a reasonable fee under the circumstances, this Court is impressed with the philosophy underlying the Criminal Justice Act. That Act provides for compensation to attorneys appointed to represent indigent criminal defendants. The Act's legislative history makes clear that although the amount provided, \$30 per in court hour and \$20 per out-of-court hour, is below normal levels of compensation in legal practice, it nevertheless is considered a reasonable basis upon which lawyers can carry out their professional responsibility without either personal profiteering or undue financial sacrifice.

* * *

"On the basis of the fee schedule set forth in the Act, therefore, this Court has determined that a reasonable fee in this case is \$30 per in-court hour and \$20 per out-of-court hour. In establishing this fee, however, the Court is careful to note that the Criminal Justice Act furnishes only a very flexible standard. In a particular case, a reasonable fee may vary either way from that provided by the Act." [Citations and footnotes omitted.]

The Court also noted, in a footnote, that

[Cont'd]

300.17 (Cont'd)

"[t]he able and invaluable assistance which plaintiffs' attorneys received from amici in this case in no way detracts from the quality of their effort. The Court is constrained, however, to comment generally on the number of lawyers for whom plaintiffs seek attorneys' fees. Because this case is so complex and the time required to meet various deadlines so great, the Court feels that the number of lawyers utilized by plaintiffs was necessary. In another case in which attorneys' fees are appropriate, the same may not be true. The Court must decide on an ad hoc basis whether the number of attorneys employed and the time expended by them were reasonable."

300.18 - *Gaddis v. Wyman*, 336 F. Supp. 1225 (S.D.N.Y. 1972)

A. No. 69 Civ. 2921

B. Counsel for Plaintiffs: Legal Aid Society of Westchester County (White Plains, N.Y.)

Counsel for Defendants: Louis J. Lefkowitz, William J. Stutman (New York, N.Y.)

C. Opinion, Bonsal, J., January 25, 1972

After a three-judge court, 304 F. Supp. 717 (S.D.N.Y. 1969), had enjoined the New York Social Services Department from withholding welfare funds from those who did not meet residency requirements, the Department, anticipating new legislation, withheld those funds.

Plaintiffs moved to have defendants held in contempt. The court, Bonsal, J., held defendants in contempt, and ordered them to purge themselves by disbursing the withheld funds.

The court denied plaintiffs' motion for attorneys' fees:

"The evidence indicates that defendants' denial of aid was due to bureaucratic anticipation of the new legislation and not to wilful disobedience or defiance of the injunction of the three-judge court (*see Sunbeam Corp. v. Golden Rule*, 252 F.2d 467 (2d Cir. 1958)). There is no statutory basis for awarding attorneys' fees in proceedings against public officials (*see Miller v. Amusement Enterprises*, 426 F.2d 534 (5th Cir. 1970)). The Legal Aid Society of Westchester County, attorneys for plaintiff and plaintiff-intervenors, is an OEO funded organization, and the individual attorneys from the Legal Aid Society who were involved in the action did not expend any of their own private funds. Accordingly, the court, in the exercise of its discretion, denies plaintiffs' application for attorneys' fees. *Ojeda v. Hackney*, 452 F.2d 947 (5th Cir. 1972); *Williams v. Kimbrough*, 415 F.2d 874, 875 (5th Cir. 1970); *Lee v. Southern Home Sites Corp.*, 429 F.2d 290, 295 (5th Cir. 1970)."

300.19 - *Smith v. Hill*, 285 F. Supp. 556 (E.D.N.C. 1968)

A. Civ. A. No. 2056

B. Counsel for Plaintiffs: J. LeVonne Chambers (Charlotte, N.C.), Samuel S. Mitchell (Raleigh, N.C.), Jack Greenberg, Michael Meltsner, Melvyn Zarr (New York, N.Y.), Anthony G. Amsterdam (Stanford, Calif.)

Counsel for Defendants: D. K. Stewart, Everette L. Doffermyre (Dunn, N.C.)

C. Opinion, Hemphill, J., April 11, 1968

Class action against various officials of the town of Dunn, North Carolina, seeking to enjoin enforcement of the town's vagrancy ordinance on the ground that it was unconstitutionally vague.

The district court, Hemphill, J., found that the ordinance "is vague and overbroad, restrains freedom of movement, subjects persons to arrest and detention on suspicion, in effect requires a suspect to establish his own innocence, requires compulsory employment, creates a crime of the status of indigency and imposes sanctions upon poor people which do not apply to those with wealth in violation of a variety of provisions of the Constitution of the United States including privilege and immunities guaranteed by the Constitution of the United States of America."

"A man's mere property status, without more, cannot be used by a State [or a municipality] to test, qualify or limit his rights as a citizen of the United States. To compel one to guess, on peril of prosecution, what the community expects, is to exact a clairvoyance with which most are not gifted. The fact that the class of citizens here represented may be of the public concern, strengthens their cause, for the mighty and the powerful seldom find need for the protections of the Constitution.

* * *

"The vice of a statute or ordinance which permits the public and courts such arbitrary and oppressive censorial power over a body of citizens is compounded by the potential that the power will be used to repress free speech and other conduct of the citizen protected by the federal Constitution. . . . Few will risk the possibility of criminal prosecution by obstinate endurance in unpopular conduct if they know that their activities may displease those who, under the Dunn vagrancy ordinance, have dictatorial control over the streets and public places." [Citations omitted.]

300.19 (Cont'd)

Because the Dunn vagrancy ordinance was "patently unconstitutional on its face," the court enjoined enforcement of the ordinance. It also awarded attorneys' fees:

"Plaintiffs' counsel are awarded attorneys' fees in the amount of Five Hundred Dollars. *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939).

"Defendants shall pay the costs of the action."

300.20 - *Blumenthal v. Lee Memorial Hospital*, ____ F. Supp. ____
(E.D. Ark. August 6, 1971)

A. No. H-70-C-5

B. Counsel for Plaintiffs: John T. Lavey (Little Rock,
Ark.)

Counsel for Defendants: G. Ross Smith (Little Rock,
Ark.)

C. Consent Decree, July 7, 1971; Opinion and Supplemental Decree, August 6, 1971; Order, September 30, 1971, Harris, J.

Plaintiffs filed a class action complaint with the district court alleging that members of the defendant class, in denying medical staff privileges at Lee Memorial Hospital to qualified VISTA doctors on the ground they were not "engaged in the private practice of medicine in Lee County, Arkansas," violated the rights of due process, equal protection and freedom of association of both the doctors and the indigent patients of the Lee County Cooperative Clinic.

Plaintiffs and defendants subsequently agreed to the entry of a Consent Decree, with the following provisions, *inter alia*: (1) all qualified VISTA doctors associated with the Lee County Cooperative Clinic would be given full medical staff privileges at Lee Memorial Hospital, provided they were licensed to practice medicine in the State of Arkansas; (2) the VISTA doctors would admit and treat only those patients who met OEO guidelines for eligibility for OEO medical services; if such patients are later found to be ineligible, they will be transferred to a private doctor of their own choice; (3) patients of VISTA doctors will be admitted in the same manner as other patients; and (4) VISTA doctors will be on an equal basis with other staff doctors in regard to the allocation of beds.

The court taxed costs against the defendants, asked for memoranda in support of plaintiffs' Motion for Attorneys' Fees, and retained jurisdiction for a period of one year.

One month later, the court, on August 6, 1971, held that plaintiffs should be awarded counsel fees [even though no trial had been held, and even though the Consent Decree specifically recited that neither side accepted the other's contentions], and assessed them against defendants in the amount of \$1,550, the amount requested by plaintiffs' attorney.

Although the complaint was filed under 42 U.S.C. §§ 1981 and 1983, the court found that, because the denial of privileges to VISTA doctors injured their indigent patients -- most of whom were black -- the case came within the framework of the equal public accommodations provisions of Title II of the Civil Rights Act of 1964, including specifically the attorneys' fee provision of 42 U.S.C. § 2000a-3(b).

[Continued]

300.20 (Cont'd)

In rejecting a motion to alter or amend its attorneys' fee award of August 6, the court later added (on September 30, 1971):

"On this single question of allowing attorney's fees to counsel for the plaintiffs, the Court relied on the civil rights acts, the application of the Fourteenth Amendment to the Constitution of the United States and federal rules providing for class actions, Rule 23 Federal Rules of Civil Procedure."

300.21 - *Shull v. Columbus Municipal Separate School District*, 338
F. Supp. 1376 (N.D. Miss. 1972)

A. Civ. A. No. EC 71-126S

B. Counsel for Plaintiffs: Robert B. Prather (Columbus,
Miss.)
Counsel for Defendants: Shields Sims (Columbus, Miss.)

C. Opinion, Smith, J., February 25, 1972

Class action under 42 U.S.C. § 1983, brought by 10th grade student of Columbus, Mississippi, school, alleging that the school's refusal to accept her as a student because she was an unwed mother was an unconstitutional denial of equal protection.

The Northern District of Mississippi, Smith, J., first granted a preliminary injunction prior to the start of the school year so that plaintiff could attend classes. It then permanently enjoined defendants from excluding plaintiff and members of her class from school solely because they were unwed mothers, stating that defendants' action was unconstitutional unless it alleged and proved, in a due process hearing, that plaintiff was morally unfit to attend public school; and that the mere fact that she was an unwed mother did not constitute proof of her moral unfitness.

Because the Northern District of Mississippi, Keady, J., had ruled, six months before this suit was initiated, that Columbus' unwed mother policy was an unconstitutional denial of equal protection (*Smith v. Columbus Municipal Separate School District*, No. EC 71-3-K (N.D. Miss. January 15, 1971)), the court found the school board's action arbitrary, and assessed costs and attorneys' fees against the board:

- "It is difficult for the court to understand why after *Smith*, the school board held the opinion that the board was at liberty to continue to enforce the unwed mother policy.

"A different situation would be presented had changes [*sic*] of other misconduct on the part of plaintiff been placed against plaintiff by the board. Such is not the case, however. The only charge against plaintiff was that she was an unwed mother. . . . In the opinion of the court the action of the board was arbitrary and an allowance of fees is proper."

The court awarded attorneys' fees of \$1,500 (including telephone and mileage), in addition to general costs.

300.22 - *Callahan v. Sanders*, 339 F. Supp. 814 (M.D. Ala. Sept. 7, 1971)

A. Civil Action No. 3374-N

B. Counsel for Plaintiffs: Morris Dees, Jr., Joseph J. Levin, Jr. (Montgomery, Ala.)
 Counsel for Defendants: William J. Baxley, Leslie H. Hall, L. H. Walden, Jasper Roberts (Montgomery, Ala.), Harry Raymond (Tuskegee, Ala.), Ralph R. Banks, Jr. (Eutaw, Ala.), J. Earl Smith (Dothan, Ala.), Paul J. Hooton (Roanoke, Ala.), C. Neal Pope, Charles Floyd (Phenix City, Ala.), Walter J. Merrill (Anniston, Ala.), Kenneth R. Cain (Ozark, Ala.), John B. Crawley, John W. Gibson (Troy, Ala.), Taylor Wilkins, Jr., C. Lenoir Thompson, Kenneth Cooper (Bay Minette, Ala.), T. R. Ward (Abbeville, Ala.), Richard H. Poellnitz (Greensboro, Ala.)

C. Opinion, Johnson, J., September 7, 1971

Class action against Alabama Justices of the Peace, Sheriffs, and other officials, under 42 U.S.C. § 1983. Plaintiffs alleged a deprivation of rights by virtue of the fact that, even after several decisions ruling that Alabama Justices of the Peace could not constitutionally hear traffic cases because of their pecuniary interest in such cases, sheriffs continued to assign traffic cases to Justices of the Peace, and Justices of the Peace continued to hear and rule on such cases. Plaintiffs sought injunctive relief, restitution of all fines paid in JP court for traffic violations, punitive and compensatory damages, and attorneys' fees.

The court, Johnson, J., enjoined pending and future traffic cases in JP courts: "By trying plaintiffs' traffic cases, the defendant Justices deprived them of constitutional rights, and injunctive relief, therefore, is warranted. . . . [T]his Court is not barred from enjoining even pending cases in Justice of the Peace Courts."

The court, however, refused to order restitution of fines paid by the class: the record indicated that the named plaintiffs were guilty of traffic violations, and there was no evidence that they had been induced to pay the fines by fraud.

The court also refused to assess compensatory or punitive damages, finding that plaintiffs had sustained no actual monetary loss, and defendants had

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300.22 (Cont'd)

not been wilful in their actions, and therefore should not be assessed punitive damages.

As for attorneys' fees, the court held:

"The Supreme Court's action in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), while liberalizing the rule [against fee shifting] in civil rights cases, continued to leave the matter in cases such as the one *sub judice* to the discretion of the trial judge. . . . Here the circumstances above set out regarding the lack of education and legal training of the individual Justices, the legislative approval of their actions and the lack of disapproval by the state's chief legal officer, would render such an award unjust. Although it may be that plaintiffs in prosecuting this action have rendered a public service, an award against the individual Justices of the Peace could serve only punishment purposes. Consequently, this Court, in the exercise of its discretion, declines to make such an award in this case."

* * *

Callahan v. Wallace, ____ F.2d ____ (5th Cir. Sept. 11, 1972)

A. No. 71-3309

B. Counsel above

C. Wisdom, Thornberry, & Godbold, JJ.

D. Opinion, Godbold, J., September 11, 1972

Appeal from the denial of attorneys' fees and damages in the above case.

The fifth circuit, Godbold, J., found that a court order to refund fines paid to those who paid them might result in reprosecution of the plaintiff class (some 50,000 people) in a different court system, and reasoned that "it [is] highly unlikely that many in the class would prefer to eschew the dollar benefit sought to be conferred upon them without their knowledge and let sleeping dogs lie."

On the attorneys' fee issue, the court found that, although the counsel seeking the fees "were not responsible for successful establishment of the underlying legal principle which, in effect, 'created the fund' of fines the refund of which plaintiffs sought," [there had been two earlier cases in Alabama which had established that traffic fines could not be levied in J.P. court],

"[n]evertheless, while recognizing the discretion of the trial judge, we think he erred in declining to award attorney fees in any amount. Plaintiffs' attorneys prepared and presented a full blown case at trial, although there

300.22 (Cont'd)

was little reason for defendants to require them to do so. It is unquestionable that plaintiffs' attorneys rendered a public service by clearly establishing the applicability of [the earlier cases] to every justice and every sheriff and state trooper, by laying to rest the confusion that had existed, and by bringing to an end the improper practice."

The circuit court remanded for an award of attorneys' fees, and taxed the costs of the appeal against appellees.

300.23 - *Taylor v. City of Millington, Tennessee*, ____ F. Supp. ____
(W.D. Tenn. April 25, 1972)

A. Civil Action No. 71-249

B. Counsel for Plaintiffs: OEO Legal Services, Memphis,
Tennessee

C. Memorandum Opinion, Wellford, J., April 25, 1972

Class action by blacks challenging the policy of segregation engaged in by the Millington, Tennessee, Housing Authority (MHA) in administration of public housing. The court, Wellford, J., found that the MHA maintained two completely segregated housing projects, in violation of 42 U.S.C. § 1982 and Title VI of the Civil Rights Act of 1964, and enjoined continuation of the segregation policy.

The court found that "there has been no malevolent intent or even intentional discrimination practiced by the defendants . . . in the sense of invidious, active and willful acts directed against these plaintiffs by reason of their race." It therefore refused to award punitive damages. It did, however, award nominal damages of \$50.00 each to two named plaintiffs. It also awarded \$400.00 attorneys' fees to *OEO Legal Services lawyers*, "on the authority of *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968) and *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971). The award of damages and costs is made against the Millington Housing Authority, its Commissioners and its manager."

300.24 - *Ford v. White*, ____ F. Supp. ____ (S.D. Miss. August 3, 1972)

A. Civil Action No. 1230(N)

B. Counsel for Plaintiffs: Bob Fitzpatrick (Washington, D.C.), Lawrence A. Aschenbrenner (Portland, Ore.), George Peach Taylor (Jackson, Miss.)

C. Memorandum Opinion, August 3, 1972, Nixon, J.

Jury discrimination suit brought as class action by Issaquena County, Mississippi, blacks, who were later joined by Issaquena County women. The suit, which was originally filed in April 1968, was heard by the Southern District of Mississippi, and remanded by the fifth circuit, resulting finally in the entering of a consent decree approved by the court on November 1, 1971. In that consent decree, the question of attorneys' fees was left for disposition by the court after briefing.

On August 3, 1972, the Southern District of Mississippi, Nixon, J., issued an opinion awarding plaintiffs' attorneys \$5,000 in attorneys' fees, stating:

"Although the allowance of attorneys' fees is normally predicated upon contract or statutory authorization, it is well established that this Court does have the inherent equitable power to award attorneys' fees where the circumstances warrant. In the exercise of this equitable discretion in civil rights cases, courts have generally required a showing of unreasonable and obdurate obstinacy or bad faith on the part of the defendant before granting this extraordinary relief.

"There has recently emerged, however, a separate and more far-reaching basis for the awardance of attorneys' fees, premised upon a successful class of plaintiffs' effectuation of a strong national policy dependent upon private litigation for its enforcement.

* * *

"The plaintiffs do not base their claim for attorneys' fees on any bad faith or unreasonableness on the part of the defendants. From the outset, the defendants and their attorney have worked closely with the attorneys for the plaintiffs as is evidenced by the final resolution of this case by a Consent Decree. . . .

"This case does, however, fall within the guidelines enunciated in *Newman v. Piggie Park Enterprises, Inc.*

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300.24 (Cont'd)

[No. 400.01, *infra*]; *Lee v. Southern Home Sites* [No. 300.01, *supra*]; *Sims v. Amos* [No. 100.10, *supra*]; *Bradley v. School Board of City of Richmond* [No. 200.01, *supra*]. The elimination of any discrimination in the jury selection process is certainly a strong national policy and is dependent upon actions of private individuals for its enforcement. Furthermore, the good faith of the defendants or the absence of an obligation to pay counsels' fees on the part of the individual plaintiffs, represented herein by the Lawyers Committee for Civil Rights, are not factors which may be considered by this Court in determining the allowability of attorneys' fees."

Plaintiffs' estimated their time for preparation and trial at 768 hours, plus 77 hours for the remand hearing. The court, however, did not feel this amount of time was necessary:

"Even considering all of the evidence in the light most favorable to the plaintiffs, this Court is of the opinion that a vast portion of the estimated time spent in this case was unnecessary for a full and complete representation of the class of plaintiffs.

* * *

"Although the question of whether attorneys' fees should be awarded in cases of this type has seemingly lost most, if not all, of its discretionary character, it is important that the Court weigh all the evidence carefully in the exercise of its remaining discretion in determining the amount to be awarded. After a careful analysis of all the factors . . . this Court finds and is of the opinion that plaintiffs are entitled to what it considers to be a fair and reasonable award of attorneys' fees in the sum and amount of \$5,000.00."

300.25 - *Newman v. Alabama*, ____ F. Supp. ____ (M.D. Ala. Oct. 4, 1972)

A. Civil Action No. 3501-N

B. Counsel for Plaintiffs: Joseph D. Phelps (Montgomery, Ala.)

C. Opinion, Johnson, J., October 4, 1972

Class action by prisoners in Alabama alleging a deprivation of adequate medical treatment in violation of the eighth amendment.

The Middle District of Alabama, Johnson, J., found that defendants had "fallen far short of supplying the constitutionally required level of adequate medical treatment," resulting in "a degree of neglect of basic medical needs of prisoners that could justly be called 'barbarous' and 'shocking to the conscience.'" The court further found that defendants' failure to provide adequate medical treatment "constitutes a willful and intentional violation of the [eighth and fourteenth amendment] rights of prisoners."

The court ruled that the case was "a classic one requiring the granting of an attorney's fee. Here an attorney's fee is to be awarded because of the positive benefit resulting to the plaintiffs and the members of plaintiffs' class. . . . [B]y pursuing a private remedy in this Court, plaintiffs clearly have benefited substantially a large class of others in the same manner as they have benefited themselves."

Accordingly, the court ordered, in addition to sweeping injunctive relief, an attorneys' fee of \$12,000 (\$30 per hour), plus \$2,483.42 costs, to the prisoners' court-appointed attorney.

300.26 - *Roberts v. Wilson*, ____ F. Supp. ____ (D.D.C. Oct. 3, 1972)

A. Civil Action No. 1436-71

B. Counsel for Plaintiffs: Chester C. Shore (Washington, D.C.)

Counsel for Defendants: Stephen Shane Stark (Washington, D.C.)

C. Opinion, Gesell, J., October 3, 1972

Suit for false arrest and deprivation of civil rights brought by two men arrested during demonstrations in Washington, D.C., by the District of Columbia. The men had been on their way to work, without buttons or signs, and had been arrested by the police, and detained until 4:30 the following morning in an outdoor stadium. They were charged with disorderly conduct and posted \$10.00 collateral before being released; the prosecutions were subsequently dropped.

The District of Columbia District Court, Gesell, J., found that the arrests were "without probable cause in each instance and that the resulting imprisonment was improper." Even though the court found no maliciousness on the part of the District of Columbia, and found that plaintiffs had sustained "no monetary loss" nor loss of employment, it awarded each plaintiff \$3,000 compensatory and \$500 punitive damages, finding that, although the plaintiffs were not beaten by the police, they had been teargassed and suffered because of a lack of food and sanitary facilities. The court held:

"The constitutional protections that are available to citizens of this country are protections which must be zealously safeguarded and the appropriate time to safeguard them particularly is in times of stress and strain. They were not safeguarded here by the authorities and there is nothing in the circumstances of the arrests which leads the Court to feel that there was an emergency condition confronting the police at the point where these arrests were made that would in any way have justified the conduct of the police officers."

The court taxed the costs of the suit against defendants, and, in addition to the total of \$7,000 compensatory and punitive damages, awarded plaintiffs' attorney \$2,000 attorneys' fees.

300.27 - *Smith v. Medgar Evers Comprehensive Health Center*, ____ F.
Supp. ____ (S.D. Miss. Nov. 7, 1972)

A. Civil Action No. 72W-26

B. Counsel for Plaintiffs: Firnist Alexander, John C.
Brittain (Jackson, Miss.)

C. Opinion, Cox, J., November 7, 1972

Suit by two dismissed employees of the Medgar Evers Comprehensive Health Center in Fayette, Mississippi, who had been fired for cause, despite written contracts, without hearings. The Southern District of Mississippi subsequently ordered hearings and formal written findings.

After such hearings, the Southern District of Mississippi ruled that, because defendants had, after filing of this suit, paid plaintiffs their salaries up through the end of the contract, even though they were not working, defendants had "discharged their liability to the plaintiffs under said contracts . . ." and should not be forced to pay damages. The court ruled, however, that the suit was necessary to recover monies due under the contracts, and therefore plaintiffs should recover costs and attorneys' fees:

"Both plaintiffs join in the same suit and are, therefore, entitled to recover one attorney's fee. This is not a large law suit except through the eyes of counsel. It has been literally blown all out of proportion to its importance and magnitude. The rule in equity in such cases is to do full and complete justice and no more.

"It is the view of this Court that an attorney's fee under the circumstances in the amount of \$500.00 would be fair and reasonable."

300.28 - *Cooper v. Allen*, 5 E.P.D. ¶ 7952 (5th Cir. 1972)

- A. No. 71-3186
- B. Counsel for plaintiff-appellant: Moore, Alexander &
Rindskopf (Atlanta, Ga.)
Counsel for defendant-appellees: Robert S. Wiggins,
Henry L. Bowden (Atlanta, Ga.)
- C. Rives, Bell & Morgan, JJ.
- D. Opinion, Rives, J., August 29, 1972

Plaintiff-appellant, a black denied a position in 1969 as a golf pro for the City of Atlanta, Georgia, because of his failure to pass the Otis intelligence test, filed suit in the Northern District of Georgia, 4 E.P.D. ¶ 7695 (N.D. Ga. 1971). In this suit, plaintiff purported to represent all blacks denied, for failure to pass the Otis test, any of 20 positions for which passing such a test was a prerequisite. Suit was brought under 42 U.S.C. § 1983 and Title VII of the Civil Rights Act of 1964. The district court held the suit could not be maintained either as a Title VII action (because of plaintiff's failure to exhaust other remedies) or as a § 1983 action. It did, however, find jurisdiction in 42 U.S.C. § 1981. It also limited the class to those blacks denied jobs as golf pros because they failed the Otis test.

The court below found that, even in a § 1981 as opposed to a Title VII case, a test must "bear a substantial relationship to the demands of the work to be performed." The district court found: (1) that the test was discriminatory because it barred a disproportionate number of blacks; and (2) that the test was not reasonably related to job performance. Use of the test to evaluate applicants for the job of golf pro was therefore enjoined. The court denied back pay as of the date defendant failed the test, denied attorneys' fees, and taxed costs equally against the plaintiff and defendants.

On appeal, plaintiff-appellant seeks: reversal of the district court's narrowing of his class; an award of back pay; and award of attorneys' fees; taxation of costs against defendants; and an order requiring the City to appoint him to fill the next municipal golf pro vacancy.

The fifth circuit refused to reinstate the original class, because "the factual issues are too diverse to warrant class treatment."

As to back pay and the sought for injunction appointing plaintiff-appellant golf pro as soon as a vacancy appeared, the district court ruled that plaintiff had failed to prove he was the most qualified applicant, and was therefore due neither. The fifth circuit ruled that it was error for the district court to require plaintiff-appellant to bear the burden of proof; that the City would have to show plaintiff-appellant would not have been hired even absent the discriminatory test. The court therefore remanded to the district court to give the

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300.28 (Cont'd)

City an opportunity to prove "that the person actually hired was on the whole better qualified for the job." Absent such a showing, the district court should, stated the fifth circuit, award both back pay and individual injunctive relief.

As to attorneys' fees, the circuit court held that, although the question whether to award fees was one ordinarily left "in the sound discretion of the trial judge," the trial judge's discretion had been considerably narrowed by the Supreme Court's opinion in *Newman v. Piggie Park Enterprises*, No. 400.01, *infra*:

"Admittedly, *Newman* involved a suit brought under a civil rights statute which makes specific allowance for attorneys' fees. But in *Lee v. Southern Home Sites Corp.*, 429 F.2d 290 (5th Cir. 1970), this Court extended the *Newman* doctrine to section 1982 suits. There is no relevant distinction between a section 1982 suit and a section 1981 suit such as this one. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). Moreover, in *Lee* this Court said that, when a court refused attorneys' fees in a 1982 suit (and by analogy in a 1981 suit), it must set out the findings of fact and grounds upon which its refusal rests.

"If on remand the district court cannot articulate specific and justifiable reasons for its denial of attorneys' fees, it should make a reasonable award."

As to assessment of costs below, the fifth circuit stated: "In light of this opinion the district court should also feel free to reassess costs."

300.29 - *Jinks v. Mays*, 464 F.2d 1223 (5th Cir. 1972)

A. No. 72-1079

B. Counsel for Plaintiff-Appellant: Moore, Alexander &
Rindskopf (Atlanta, Ga.)
Counsel for Defendant-Appellees: Troy R. Millikan,
Warren Fortson, Lenwood A.
Jackson (Atlanta, Ga.)

C. Wisdom, Ingraham & Bootle, JJ.

D. Opinion, Bootle, J., July 31, 1972

Plaintiff-Appellant was successful below in obtaining an injunction against a public school policy which denied maternity leave to nontenured teachers. 4 E.P.D. ¶ 7684 (N.D. Ga. 1971). The court below ruled that this policy was an unconstitutional denial of equal protection. On appeal, plaintiff-appellant challenges the trial court's denial of back pay, and that court's failure to rule specifically on plaintiff's request for attorneys' fees.

The court below had denied an award of back pay because plaintiff-appellant had never sought reinstatement, and there was therefore neither proof that reinstatement would have been denied her nor a date on which reinstatement was denied from which to calculate back wages. The fifth circuit affirmed.

The court below also failed to rule on plaintiff-appellant's request for attorneys' fees. The fifth circuit ruled:

"Since the District Judge never ruled on plaintiff's demand for attorneys' fee and since this court is not empowered to make an initial adjudication on such a claim, we remand this issue to the district court for its determination without the slightest intimation as to what his decision should be. . . . The allowance of such fees is within the discretion of the district court and its exercise of this discretion will not be upset on appeal in the absence of clear abuse."

* * *

Jinks v. Mays, ____ F. Supp. ____ (N.D. Ga. Nov. 22, 1972)

A. Civil Action No. 13977

B. Counsel above

C. Order, Edenfield, J., November 22, 1972

On remand from the above, the district court indicated that, absent bad faith or "obdurate obstinacy," it felt "that a denial of an award of attorney's

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300.29 (Cont'd)

fees; under the circumstances of this particular case would not be an abuse of discretion." Following the fifth circuit's reasoning in *Cooper v. Allen*, No. 300.28, *supra*, however, the court stated that *Lee v. Southern Home Sites Corp.*, No. 200.01, *supra*, extended *Newman v. Piggie Park Enterprises*, No. 400.01, *infra*, to cases brought under 42 U.S.C. § 1982 and, by analogy, 42 U.S.C. §§ 1981 and 1983. Thus, in a case such as the present § 1983 action, fees should be granted "as a matter of course unless special circumstances would render such an award unjust."

"Indeed, in *NAACP v. Allen*, 340 F. Supp. 703 (M.D. Ala. 1972), Judge Johnson wrote that in successful § 1983 suits which effectuate strong congressional policy against discrimination an award of attorney's fees should be an integral part of the equitable relief and should not depend on a showing of defendant's bad faith.

"The benefit accruing to the class on whose behalf plaintiff successfully prosecuted this case is substantial and important. Non-tenured teachers in the Atlanta school system are now eligible for maternity leave and need not resign from their positions when it becomes necessary for them to leave due to pregnancy. Plaintiff was specifically denied monetary relief in this case and the litigation can be fairly characterized as *pro bono publico* on the part of plaintiff's counsel. As Judge Johnson observed in *NAACP v. Allen*, *supra*, 708-710, such litigation must be encouraged in order to vindicate the federal rights of our citizens."

300.30 - *The Stanford Daily v. Zurcher*, ____ F. Supp. ____ (N.D. Cal. Aug. 10, 1973)

A. No. C-71-912 RFP

B. Counsel for Plaintiffs: Anthony G. Amsterdam (Palo Alto, Cal.)

Counsel for Defendants: Lee Stevens (San Jose, Cal.)

C. Memorandum and Order, Peckham, J., August 10, 1973

Suit brought by the Stanford Daily, an unincorporated newspaper, and its student editors, against the Chief of the Palo Alto Police Department, the Santa Clara County District Attorney and Deputy District Attorney, individually and in their official capacities, alleging that the Palo Alto Police Department searched the offices of the newspaper, although no one there was suspected of a crime, in violation of the Fourth Amendment. On October 5, 1972, the Northern District of California granted plaintiffs the declaratory relief and injunction sought, stating that the defendants should have gotten a subpoena *duces tecum* rather than a search warrant.

The court awarded plaintiffs attorneys' fees:

"If a party chooses to vindicate his fourth amendment rights which have allegedly been violated by a law enforcement officer, albeit in good faith, he is relegated to declaratory and injunctive relief. The aggrieved person must be prepared to make the kind of showing which would warrant equitable relief. And lastly, for no pecuniary gain, he is required to engage in extensive litigation at considerable cost including attorney's fees, just for the satisfaction of having a court determine that the police violated the Constitution, and possibly obtaining an injunction if he can show that there is a real possibility the violation may reoccur.

"It is not surprising that when faced with the costs of interminable litigation against a city and county with relatively unlimited resources measured against the limited satisfaction obtained when and if relief is finally given, many potential plaintiffs are unwilling to take on the task of 'fighting City Hall.'"

The court then stated that, although it is an American view "that recourse to litigation is not wrong, and that the party who does not prevail ought not to be penalized for his resort to the courts to vindicate his rights," the general American rule disallowing attorneys' fees deters litigation:

"The inability to get attorney's fees directly, or indirectly, through damage awards, has the effect of deterring many po-

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300.30 (Cont'd)

tential plaintiffs from seeking redress in the courts."

The court found that, in order for a court sitting in equity to be able to award attorneys' fees, two questions must be answered positively: whether it is the type of case in which the court has discretion to award fees, and, if so, whether it would not be an abuse of this discretion to award fees.

The types of cases in which fees can be awarded, stated the court, are those in which a "common fund" is produced; those in which substantial benefit, not necessarily monetary benefit, is produced; and those which "effectuate the congressional underpinnings of a substantial program." In this fourth amendment action, stated the court, an award of attorneys' fees is proper, as the fourth amendment contains "[n]o detailed pattern of remedies such that one could fairly draw the inference that the remedies provided were complete. . . ."

"Additionally, 42 U.S.C. § 1983 and its jurisdictional commitment, 28 U.S.C. § 1343(3) represents congressional indication that federal courts should use their equitable powers to insure vindication of the rights protected by the Constitution and laws from infringement by those acting under color of state law, by implying an award of attorney's fees as costs. . . . The *raison d'être* of 42 U.S.C. § 1983 is to encourage the vindication of constitutional rights, to promote litigation of the rights involved, and to give the courts leeway to fashion appropriate remedies. *Cf.* 42 U.S.C. § 1988.

* * *

"Accordingly this court feels that in equitable suits to remedy violations of fourth amendment rights of those not suspected of criminal activity, an award of attorney's fees as costs is within the court's power and responsibility. Where as here fee shifting is necessary to insure the vindication of important constitutional rights and appropriate because of the inadequate remedies otherwise available, because it is consistent with a remedy increasingly furnished by Congress, and because of the high social value placed upon the rights involved, an award of attorney's fees as costs is essential, lest these important rights be relegated to a mere platitude."

The court found that the defendants' asserted defense of immunity from damages by reason of their good faith was not applicable in the instant case. First, stated the court, attorneys' fees are separate from damages. "Unlike damages an award of attorney's fees is not imposed in any way to penalize, stigmatize, or punish the defendants for wrongdoing." It is, rather, for the purpose of effectuating a strong Congressional policy. Also, the law in California is that any judgment against an official, acting in his official capacity, will be paid by the State, not the individual, so law enforcement would not be hampered by the award.

Parenthetically, the court stated that

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300.30 (Cont'd)

"the Daily was fortunate enough to have a law professor on the Stanford campus willing to bring the litigation. But this Court has already indicated its unwillingness to rest the vindication of important rights on the chance that some attorney, public interest law firm, or legal aid agency will be willing to represent the plaintiff without hope of remuneration."

300.31 - *Quad -Cities Community News Service, Inc. v. Jebens*, 334 F. Supp. 8 (S.D. Iowa 1971)

A. Civil Action No. 4-989-D

B. Counsel for Plaintiffs: Robert Bartels (Davenport, Iowa)

Counsel for Defendants: Margaret Stephenson (Davenport, Iowa)

C. Judgment, Hanson, J., November 3, 1971

Suit under 42 U.S.C. § 1983, alleging that the Davenport Police Department failed to make available certain of its records to plaintiffs, publishers of an underground newspaper, while making such records available to other media, in violation of plaintiffs' first, fifth and fourteenth amendment rights. Defendants urged that their refusal to grant press passes and access to police files to Quad-City News Service was grounded on the fact that Quad-City was not a "legitimate" newspaper.

The Southern District of Iowa, Hanson, J., found that "the Davenport Police Department has engaged in discriminatory practice in not allowing Quad-City access to police files which are readily available to other local media . . ." The court found that the Police Department could not justify their refusal by any showing that it promoted a compelling governmental interest, and therefore enjoined the defendants from denying Quad-City access to police files.

In addition, the court awarded plaintiffs' counsel, *OEO Legal Services Lawyers*, \$150 attorneys' fees:

"At no time have Defendants filed any pleadings, responsive or otherwise. At the close of the Hearing, the Court granted the parties additional time to file any pleadings or briefs and arguments and Defendants again failed to respond. Plaintiff was finally compelled to communicate to the Court its own understanding of Defendants' position upon the issue of relief. . . . The evidence showed that Plaintiffs fully exhausted their remedies outside of the courts to vindicate their constitutional rights before filing this action, and that Plaintiff's attempts included efforts by their counsel, to all of which Defendants showed no inclination to respond, with the exception of making the statement that they would not give any reasons for their actions. The Court finds that Defendants' actions in dealing with Plaintiff were deliberate and without any hope or anticipation of prevailing on the merits. The court will therefore award Plaintiff the costs incurred in this action plus attorneys' fees."

300.32 - *Webb v. Baxley*, ____ F. Supp. ____ (M.D. Ala. Jan. 18, 1973)

A. Civil Action No. 3564-N

B. Counsel for Plaintiffs: Howard Mandell (Montgomery, Ala.),
Drake, Knowles & Still (Tuscaloosa,
Ala.)

C. Judgment, Varner, J., September 20, 1972; Order, Varner, J.,
January 18, 1973

Class action under 42 U.S.C. § 1983 alleging discrimination against blacks and women in the jury selection of Pike County, Alabama. Plaintiffs and defendants settled, and judgment was issued by the Middle District of Alabama on September 20, 1972. Thereafter, on September 19, 1972, plaintiffs' attorneys filed a request, opposed by the defendants, for attorneys' fees. The court issued an order on January 18, 1973, awarding a total of \$2,050 fees to plaintiffs' counsel (who had requested \$4,027.50), and taxing costs against the defendants.

300.33 - *Langford v. City of Texarkana, Arkansas*, ____ F.2d ____ (8th Cir. April 25, 1973)

A. No. 72-1187

B. Counsel for Plaintiffs: John T. Lavey (Little Rock, Ark.)

C. Lay, Heaney & Stephenson, JJ.

D. Opinion, Heaney, J., April 25, 1973

Appeal from the Western District of Arkansas. Plaintiffs, a black and a white employee of the City of Texarkana, Arkansas, alleged that they were discharged "without notice or hearing in violation of the due process clause of the Fourteenth Amendment to the United States Constitution, and for exercising their right to freely associate with persons of all races in violation of the First, Ninth and Fourteenth Amendments to the Constitution."

The Eighth Circuit reversed plaintiffs' loss below, stating that the trial court had not made necessary factual findings about whether plaintiffs' interracial associations were a factor in their discharge.

"The trial court discussed the applicable law and the evidence in a memorandum opinion. It questioned whether City employees have a constitutional right to associate with persons of all races but assumed, for the purposes of the opinion, that they did. It then stated:

"'. . . While Texarkana is not entitled to be concerned with trying to keep Langford and Mrs. Johnson from associating together as citizens and/or as persons, if the exercise of their right to associate (*if that right exists*) creates such a state of community rejection in the Texarkana area that it destroys or materially and substantially impairs the ability of Langford and Johnson to discharge the duties of their City employment, then Texarkana is required to step in and terminate their employment.' (Emphasis added.)"

The Eighth Circuit ruled that the

"fact that interracial associations are frowned on by some in a community cannot serve as a justification to discourage or prohibit such associations by public employees. This is true even if opposition to the interracial associations results in diminishing the effectiveness of the employees."

The Circuit Court remanded with instructions to ascertain whether exercise of plaintiffs' rights of free association was a factor in their dismissal, and to reinstate plaintiffs and assess damages if such were found to be the case.

The court awarded plaintiffs' counsel \$500 for processing the appeal.

300.34 - *Yeomans v. Massey*, ____ F. Supp. ____ (N.D. Fla. Jan. 19, 1973)

A. Civil Action No. 1762

B. Counsel for Plaintiffs: Kent Spriggs (Tallahassee, Fla.)

Counsel for Defendants: Alton M. Towles (Quincy, Fla.)

C. Consent Order No. 2, Middlebrook, J., January 19, 1973

Class action alleging discrimination against blacks and women in jury selection in Gadsden County, Florida. Defendants and plaintiffs, on November 13, 1972, signed a consent order providing for certain changes in methods of jury selection, but leaving for determination by the court the questions of: (1) whether defendants had, in fact, discriminated as a matter of law; and (2) whether plaintiffs' lawyer should be awarded attorneys' fees. On January 15, 1973, the court, Middlebrook, J., found that defendants had discriminated as a matter of law, and that plaintiffs' counsel was entitled to reasonable attorneys' fees, even absent a "finding of specific intent by any of the Defendants to discriminate against the Plaintiffs or their class." On January 19, 1973, a second order was signed, in which a negotiated fee of \$1,210.00, plus costs of \$72.02, were awarded to plaintiffs' counsel.

- 300.34 -

300.35 - *Commonwealth of Pennsylvania v. Charleroi Area School District*, ____
F. Supp. ____ (W.D. Pa. Oct. 5, 1973)

A. No. 72-1119

B. Counsel for Plaintiffs: Richard Isaacson (Pittsburgh, Pa.)

Counsel for Defendants: Melvin Bassi (Charleroi, Pa.)

C. Opinion, Teitelbaum, J., October 5, 1973

Suit brought by several of 51 male students who had been expelled from junior and senior high schools in the Charleroi, Pennsylvania, area for violation of their schools' dress codes and hair length regulations. Plaintiffs had attempted to be reinstated, and, failing this, filed suit under 42 U.S.C. § 1983, and preliminarily and permanently enjoined the defendant school board from expelling any more students. The plaintiffs were also reinstated. The Western District of Pennsylvania, Teitelbaum, J., then awarded plaintiffs' counsel attorneys' fees. He stated that federal courts possess the equitable power to make a discretionary award of attorneys' fees in the presence of bad faith, or

"for service as a 'private attorney general,' in seeking to secure compliance with Congressional policy objectives by means of private litigation The award of attorney's fees for service as a private attorney general does not imply bad faith on the part of the defendants. The sole rationale of the *Newman* [v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968)] decision is the encouragement of suits advancing the public interest as it has been expressed in Congressional statutory directives."

Another rationale for fee awards, according to the court, is the "substantial benefit" rationale, which, like the "private attorney general" rationale "is devoid of any aspersion of bad faith on the part of the defendants . . . [being] based on the reasoning that it would be unjust to require one plaintiff to bear the entire expense of an action which results in benefit to a large class."

The court rejected defendants' argument that attorneys' fees are awarded in § 1983 actions only if there is racial discrimination present:

"The broad formulation of both the *Newman* and *Mills* [v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970)] decisions in terms of the furtherance of the public interest, whatever the particular focus of the statute involved, taken together with the broad language of § 1983 itself, serve on their face to negate the proposition that fees may be awarded only when racial discrimination is challenged."

The court therefore awarded successful plaintiffs' attorneys \$2,500, "in accord with the rationales of private attorney general compensation and furtherance of public interest lawsuits . . .," and despite defendants' good faith.

300.36 - *Taylor v. Perini*, ____ F. Supp. ____ (N.D. Ohio May 23, 1973)

A. Civil Action No. C69-275

B. Counsel for Plaintiffs: Niki Z. Schwartz (Cleveland, Ohio)

C. Opinion, Young, J., May 23, 1973

Prison litigation wherein after several years of negotiation and various stages of litigation, a consent order was signed and approved by the Northern District of Ohio on September 12, 1972. 359 F. Supp. 1185 (N.D. Ohio 1972). The Consent Order incorporated an agreement by the State that it would pay plaintiffs' reasonable attorneys' fees, the amount to be negotiated. Negotiations proceeded until, on February 26, 1973, the Attorney General of Ohio informed plaintiffs' counsel that the State would not willingly agree to any amount.

Plaintiffs' counsel then asked the Northern District of Ohio to determine the amount due, and the State asked for reconsideration of the attorneys' fee agreement under Rule 60(b), Fed. R. Civ. P., arguing that a State is exempted from a judgment assessing attorneys' fees by the Eleventh Amendment.

The court, Young, J., held that *Sims v. Amos*, 340 F. Supp. 691 (N.D. Ala. 1972) (three-judge court), *aff'd*, 409 U.S. 942 (1972), was more persuasive than *Sincock v. Obara*, 320 F. Supp. 1098 (D. Del. 1970) (three-judge court), because the Supreme Court had heard the former case and not the latter. While neither the three-judge district court opinion nor the Supreme Court's summary affirmance in *Sims* specifically dealt with the Eleventh Amendment question, Judge Young found that the State's argument had been presented to both courts, which had nonetheless rejected the argument.

The court found plaintiffs' lawyer's request for \$21,055.07 fees and expenses reasonable, and awarded him that amount. Subsequently, the court in a clarification memorandum of July 25, 1973, stated that

"the award of attorney fees in this action runs against both the defendant [Warden] Perini and the State of Ohio [not, of course, a named defendant] and can be collected from either at plaintiffs' option."

The court also granted a stay of execution pending appeal.

300.37 - *Incarcerated Men of Allen County v. Fair*, ____ F. Supp. ____ (N.D. Ohio Oct. 5, 1973)

A. Civil Action No. C 72-188

B. Counsel for Plaintiffs: Advocates for Basic Legal Equality
(Toledo, Ohio)
Counsel for Defendants: Lawrence Huffman (Lima, Ohio)

C. Opinion, Young, J., October 5, 1973

Several inmates of the Allen County Jail filed a *pro se* petition alleging violations of constitutional rights, which the court construed as a 42 U. S.C. § 1983 class action. The court appointed Advocates for Basic Legal Equality, a largely federally funded legal organization, to represent the inmates. Most of the issues in the action were resolved in some consent orders and other orders of the court, whereupon plaintiffs' counsel sought attorneys' fees.

The Northern District of Ohio, Young, J., ruled that an award of counsel fees is within the equitable jurisdiction of a court, and granted such an award:

"The Court concludes that the interests of justice require the award to plaintiffs of reasonable attorney's fees for services of ABLE connected with this case. . . . Although there has been no finding of liability on the part of the defendants because the parties agreed to an order of the Court disposing of most of the contested matters, plaintiffs have nonetheless substantially benefited all inmates of the Allen County Jail by insuring the protection of numerous constitutional rights through the orders of this Court affecting the Allen County Jail filed in connection with this case. The litigation at issue has not only benefited the present inmates of the jail but also all future inmates of the facility. - Since all members of the general public in Allen County and all other persons subject to the jurisdiction of the Allen County courts and law enforcement agencies are potential subjects for incarceration in the Allen County Jail, the constitutional rights of the general public have been vindicated and protected by the litigation of these plaintiffs. The Court, therefore, believes that this is a proper case for the award of reasonable attorney's fees. The award of attorney's fees in cases like this one assures that the vindication of public constitutional rights need not depend upon the financial resources of the particular individuals who seek to secure those rights. ABLE has performed an important public service for those who are, or ever will be, confined in the Allen County Jail and the public which has benefited thereby should bear the financial responsibility for the litigation securing constitutional rights.

"The Court further concludes that ABLE is a proper recipient for an award of attorney's fees. Although ABLE is funded

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300.37 (Cont'd)

to a substantial extent by grants from public funds, it exercises independent judgment in performing its legal functions and in no way can be considered a part of federal, state or local government. As a non-profit, private legal organization seeking to represent persons who would otherwise receive no legal assistance because of a lack of resources to retain counsel, ABLE is much the same as other private associations, such as the NAACP, which has been held to be a proper recipient of a similar award."

The court awarded ABLE lawyers \$2,000 attorneys' fees, the amount requested:

". . . This amount, on an hourly basis, is less than fifteen dollars per hour, which is considerably below the going rates for attorney fees and only half of the amount allowed under the Criminal Justice Act, which is stated to be merely nominal compensation. It therefore appears to be a reasonable and very modest compensation for the services rendered. . . . [D]efendants have failed to file any pleading opposing the request for an award of reasonable attorney's fees. This affords further reason to believe that the amount requested is entirely reasonable."

The award was assessed against both the County and the named defendant, Sheriff Fair.

300.38 - *Gates v. Collier*, ____ F. Supp. ____ (N.D. Miss. Feb. 14, 1973)

A. Civil Action No. GC 71-6-K

B. Counsel for Plaintiffs: Roy S. Haber (Jackson, Miss.)

C. Memorandum Opinion, Keady, J., February 14, 1973

Class action by inmates of Parchman State Penitentiary under 42 U.S.C. §§ 1981, 1983, 1985 and 1994, alleging violation of the inmates' first, eighth, thirteenth and fourteenth amendment rights. The decision on the merits appears at 349 F. Supp. 881 (N.D. Miss. 1972), wherein defendants were enjoined from continuing unconstitutional practices.

Subsequent to decision on the merits, plaintiffs' counsel moved for attorneys' fees and expenses. The defendants opposed allowance of both fees and expenses. The court, Keady, J., found that fees were warranted:

"In the instant case, we have no difficulty in finding that defendants' actions were unreasonable and obdurately obstinate. . . . We are convinced that only because of the overwhelming magnitude of evidence gathered by plaintiffs' attorney in cooperation with the Department of Justice [which had intervened] in support of the allegations contained in the complaint did defendants in effect recognize the futility of a full evidentiary hearing and submit the case on a virtually agreed record.

"Defendants themselves concede that this is not a case involving unsettled questions of constitutional law. . . . We now hold that the state of the law in the area of prisoner rights was sufficiently settled so that it should have been unnecessary for this action to be brought; this suit was necessary only because of defendants' unreasonable refusal to comply with accepted constitutional principles. We are further convinced that the unnecessary delay, extraordinary efforts and burdensome expenses incurred incident to the resolution of the case were occasioned because of defendants' maintenance of the defense in an obdurately obstinate manner. Thus, plaintiffs' attorney is entitled to reasonable fees and expenses.

"Since, in our view, this is an appropriate case of exceptional circumstance for awarding attorney's fees and expenses because of defendants' unreasonable and obdurately [*sic*] obstinacy, we need not rule upon plaintiffs' alternative contention that their counsel is entitled to an award based on the theory that he was acting as a 'private-attorney general', and vindication of their rights was in the public interest." [Footnote omitted.]

Plaintiffs' counsel sought payment for 2,814-1/2 hours, at the prevailing Mississippi rate of \$35 per hour. The court disallowed certain hours, and

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300.38 (Cont'd)

determined that counsel was entitled to payment for 1,832-1/2 hours' work:

"The court finds that the prevailing rate for legal services performed in this federal district court in comparable litigation is \$35 an hour, such charge is fair and reasonable and should be here applied to determine the worth of the legal service performed by plaintiffs' counsel. Considering the nature of the case and the successful results achieved on behalf of the inmates and the amount of time invested by counsel, the court concludes that a reasonable fee for legal services would be \$65,000. . . ."

The court, however, deducted from the above award the amount which plaintiffs' counsel had received as a salary from a foundation-funded civil rights organization for which he worked while preparing and litigating the case. The total award was thus \$41,750. The court also awarded allowable expenses of \$10,986.05.

Finally, the court specified where liability for the fees and expenses thus taxed lay:

". . . The award herein shall not constitute the personal, or individual, liability of the named defendants, or any of them, but they are directed to pay same from funds which the Mississippi Legislature, at its 1973 Session, may appropriate for the operation of the Mississippi State Penitentiary."

* * *

Gates v. Collier, ____ F.2d ____ (5th Cir. Dec. 5, 1973)

- A. No. 73-1790
- B. Counsel above
- C. Tuttle, Bell & Goldberg, JJ.
- D. Opinion, Tuttle, J., December 5, 1973

Appeal from the above award of attorneys' fees. The defendants did not challenge the trial court's basis for making the award (obdurate obstinacy), but instead argued that the award could not be made against a state or state officials, because such an award would violate the eleventh amendment and the state's sovereign immunity.

The circuit court found the lower court's findings of obdurate obstinacy totally adequate "to warrant the awarding of attorney's fees," though it noted that different standards -- notably the private attorney general standard -- existed for awards in similar cases.

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300.38 (Cont'd)

The fifth circuit rejected the defendant-appellants' immunity argument, chiefly on the basis of *Sims v. Amos*, 340 F. Supp 690 (M.D. Ala. 1972) (three-judge court), *aff'd*, 409 U.S. 942 (1972), where the immunity argument was raised in the Jurisdictional Statement and the Supreme Court nonetheless summarily affirmed an award of fees against the Governor, legislators, Attorney General and Secretary of State of Alabama. The court also cited *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972), which had held that "the state may no more immunize an individual from costs incident to an injunction than it may insulate him from the injunction itself."

Finally, the court noted that

"in such a suit as this the award of attorney's fees is not an award of damages against the State, even though funds for payment of the costs may come from the state appropriations."

Attorneys' fees, stated the court, were not damages in the instant case, but an integral part of an equitable remedy.

300.39 - *Harper v. Mayor & City Council of Baltimore, Md.*, 5 FEP Cases 1050 (D. Md. 1973)

A. No. 71-1352-Y

B. Counsel for Plaintiffs: Kenneth L. Johnson (Baltimore, Md.),
Jack Greenberg (New York City)
Counsel for Defendants: George L. Russell, Jr. (Baltimore, Md.)

C. Opinion, Young, J., May 2, 1973

Class action under 42 U.S.C. §§ 1981 and 1983 alleging discriminatory employment practices were engaged in by the Baltimore City Fire Department. The district court, Young, J., found a history of refusals to hire blacks, historical segregation of facilities, and failure to promote black firemen, all in violation of plaintiffs' constitutional rights, and ordered limited injunctive relief, but refused to order back pay.

The court did, however, award successful plaintiffs attorneys' fees and litigation expenses:

"Were this a Title VII case the availability of attorneys fees could be disposed of by citation of the clear Fourth Circuit rule that attorneys fees must be awarded. [Citations omitted.] The Fourth Circuit drew on *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968) for that rule. The Piggie Park suit was under the public accommodations title of the 1964 Civil Rights Act. The rationale of that decision, that plaintiffs were vindicating a public policy that Congress considered of the highest priority, was deemed by the appellate court to be equally applicable to Title VII litigation. And though one facet of this 'private attorneys general' approach is that the litigants cannot personally recover damages and thus may be deterred from vindicating the public interest by the expense of suit, the availability of damages has not altered the Fourth Circuit rule.

"Federal courts have the discretion as a part of their equitable powers to grant attorneys fees, even absent statutory authorization. The lack of statutory authorization is particularly unpersuasive where, as in § 1981 and 1983, the statutes do not include detailed remedies. And where the suit is one to rectify racial discrimination, the better view is that the court's exercise of discretion to grant fees need not depend on a showing of bad faith on the part of defendants. Plaintiffs have effectuated a strong congressional policy by maintaining this suit, and they are entitled to attorneys fees regardless of defendants' good or bad faith." [Citations omitted.]

The court ordered attorneys' fees taxed as costs against the City of Baltimore, through its Mayor and City Council, and held that, although individual firemen

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300.39 (Cont'd)

who had intervened as defendants in the case were "beneficiaries of the discriminatory policies of defendants, they did not have the authority in and of themselves to alter the aspects of the entrance and promotion procedures which are the basis for relief," and could therefore not be held liable for court awarded fees.

300.40 - *Jones v. Holliman*, ____ F. Supp. ____ (S.D. Ala. July 9, 1973)

A. Civil Action No. 3944-65

B. Counsel for Plaintiffs: James K. Baker (Birmingham, Ala.)

Counsel for Defendants: Thomas Boggs (Linden, Ala.)

C. Order, Pittman, J., July 9, 1973

Class action under 42 U.S.C. § 1983, alleging systematic exclusion of blacks from the juries of Marengo County, Alabama.

The litigation was commenced in 1965, and counsel represented plaintiffs for five years of the litigation, including a successful appeal to the Fifth Circuit. 422 F.2d 656 (5th Cir. 1970). Counsel sought fees of \$5,700 for proceedings before both the district and appeals courts, stating that he spent about 80 hours on the district court proceedings, but not giving his time for the appeal (a rate of \$40 per hour). The Southern District of Alabama awarded \$3,000 in fees, plus \$305 for out-of-pocket expenses, without stating reasons.

300.41 - *Black v. Curb*, _____ F. Supp. _____ (S.D. Ala. July 9, 1973)

A. Civil Action No. 3872-65

B. Counsel for Plaintiffs: James K. Baker (Birmingham,
Ala.)

Counsel for Defendants: O. S. Burke (Greensboro, Ala.)

C. Order, Pittman, J., July 9, 1973

Class action under 42 U.S.C. § 1983, alleging systematic exclusion of blacks from juries in Hale County, Alabama.

The litigation was commenced in 1965, and plaintiff's present counsel had represented them for five years, including two successful appeals to the Fifth Circuit. Counsel sought fees of \$9,800, stating his time at 120 hours for the district court proceedings, but not giving his time for the appeals (a rate of approximately \$40 per hour). The Southern District of Alabama, Pittman, J., awarded plaintiffs' counsel \$5,000 in fees, plus out-of-pocket expenses of \$544, without stating reasons.

300.42 - *Hamilton v. Landrieu, Mayor of New Orleans*, ____ F. Supp. ____
(E.D. La. June 28, 1973)

A. Civil Action No. 69-2443

B. Counsel for Plaintiffs: Luke Fontana (New Orleans,
La.)

C. Order, Christenberry, J., June 28, 1973

Class action under 42 U.S.C. § 1983, alleging Eighth Amendment violations in the operation of the Orleans Parish Prison. After finding for plaintiffs on the merits, the Eastern District of Louisiana, Christenberry, J., stated that

"the defendants' actions have been 'unreasonable and obdurately obstinate,' and that but for this litigation no improvements would have been made in Parish Prison. Accordingly, an award for attorneys' fees is appropriate."

The court found an award of \$5,000 reasonable, and assessed the award against the defendants, to be taxed as costs.

300.43 - *Hamilton v. Love*, 358 F. Supp. 338 (E.D. Ark. 1973)

A. Civil Action No. LR-70-C-201

B. Counsel for Plaintiffs: Philip E. Kaplan (Little Rock, Ark.)
Counsel for Defendants: Lee Munson (Little Rock, Ark.)

C. Opinion, Eisele, J., April 25, 1973

Class action under 42 U.S.C. § 1983 alleging eighth amendment violations in the operation of the Pulaski County, Arkansas, jail. Defendants initially stipulated that conditions in the jail were unconstitutionally substandard, and the court ordered defendants to bring the facility in line with minimum constitutional standards by September 1, 1971. *Hamilton v. Love*, 328 F. Supp. 1182 (E.D. Ark. 1971).

Plaintiffs later sought to have defendants held in contempt for failure to comply with the court's order. In October 1972, the court stated that it would not hold defendants in contempt, largely because of promises made by defendants' counsel in informal hearings, but did state that it would award plaintiffs' counsel attorneys' fees because, as a result of defendants' failure to comply,

" . . . the attorneys for plaintiffs have been subjected to a barrage of complaints emanating from the jail and have spent much additional time investigating such matters and presenting them to this Court. The Court is therefore now awarding the sum of \$1,000.00 as a partial attorney's fee for plaintiffs. This is far below what could fairly be called a 'reasonable fee' for the services rendered. The Court is reserving its decision on an award of a more realistic fee pending future developments."

On April 25, 1973, after several additional hearings, the court found that the jail still did not meet minimum constitutional standards, and ordered the defendants to conform to all orders of the court in two months' time or to cease to operate the prison. The court ruled that the defendants had "failed to comply with a substantial number of the Court's previous orders," and therefore found them in contempt, and assessed "token" fines. If the defendants failed to comply once more, stated the court, more "realistic" fines would be imposed.

The court also awarded plaintiffs' counsel costs and an additional \$1,500 partial attorneys' fee.

300.44 - *Ross v. Goshi*, 351 F. Supp. 949 (D. Hawaii 1972)

A. Civil No. 72-3610

B. Counsel for Plaintiffs: Hawaii Legal Services Project
(Wailuku, Hawaii), John S. Ed-
munds (Honolulu, Hawaii)

Counsel for Defendants: Ernest K. C. Ching (Wailuku,
Hawaii)

C. Opinion, King, J., December 20, 1972

Class action under 42 U.S.C. § 1983, attacking a Maui County ordinance which banned outdoor political -- but not commercial -- signs. The district court, King, J., found that such "selective prohibition" must not only have "some rational relationship to the effectuation of a proper governmental purpose," but must also be shown to be "'necessary to promote a *compelling* state interest.'" *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972) (Emphasis by the Supreme Court). The court found that the defendants had failed to show such a compelling state interest.

Both plaintiffs, represented by OEO Legal Services lawyers, and plaintiff-intervenors, represented by private attorneys, moved for attorneys' fees under the private attorney general rationale. The court, applying the *Raza Unida* (No. 500.09, *infra*) private attorney general standard*, awarded fees to counsel for plaintiff-intervenors, but not to OEO lawyers representing the original plaintiffs.

"Because the public authorities normally charged with the enforcement of the law are defendants in this action, the only practicable means of enforcing section 1983 is by private parties, such as Plaintiffs and Plaintiffs-Intervenors, acting on their own initiative. Yet private parties are least able to bear the cost of vindicating constitutional rights -- particularly where, as in this case, they are vigorously opposed by a governmental entity.

* * *

"The Hawaii Legal Services Project, however, is funded by the government. Legal Services' attorneys can function

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*/ "[W]henver there is nothing in a statutory scheme which might be interpreted as precluding it, a 'private attorney-general' should be awarded attorneys' fees when he has benefited a large class of people, and where further the necessity and financial burden of private enforcement are such as to make the award essential." 57 F.R.D. 94, at 98 (1972).

300.44 (Cont'd)

as private attorneys general irrespective of whether this court awards them counsel fees. Indeed, this is one of the reasons underlying the establishment and funding of Legal Services Projects throughout the nation. There is thus no 'necessity' for an award of fees within the test laid down by *La Raza Unida v. Volpe*" [Citations omitted.]

300.45 - *Fowler v. Schwarzwald*, ____ F. Supp. ____ (D. Minn. Jan. 4, 1973; Feb. 9, 1973)

A. Civil Action No. 3-72-265

B. Counsel for Plaintiffs: Andrew W. Haines, Michael T. McKim, Roger S. Haydock, Dolores Grey (St. Paul, Minn.)

Counsel for Defendants: Kenneth J. Fitzpatrick, James P. Miley (St. Paul, Minn.)

C. Memorandum & Order, Devitt, J., January 4, 1973; Supplemental Memorandum & Order, Devitt, J., February 9, 1973

Class action under 42 U.S.C. §§ 1981 and 1983, wherein the St. Paul, Minnesota, Fire Department was forced to discontinue use of a discriminatory employment test. Successful plaintiffs' counsel moved for attorneys' fees, and the court, Devitt, J., denied their motion:

"There is no statutory authority for such, and this is not the type of extraordinary case where the conduct of defendants was characterized by bad faith or unreasonable or obdurate obstinacy as to justify such an award.

* * *

"Counsel for plaintiffs were diligent and effective in their advocacy and are to be commended for it, but absent statutory authority or facts showing bad faith, ill purpose or disregard of a clear constitutional duty, an award of attorneys' fees is unauthorized."

Plaintiffs' counsel then sought reconsideration of the above decision, and the court once again refused, on February 9, 1973.

The case is now on appeal to the Eighth Circuit.

300.46 - *United States v. McLeod*, 385 F.2d 734 (5th Cir. 1967)

A. Nos. 21475, 21477

B. Counsel for Plaintiffs: Harold H. Greene, John Doar, David
L. Norman (Washington, D.C.)
Counsel for Defendants: T. G. Gayle, J. E. Wilkinson, Jr.
(Selma, Ala.)

C. Woodbury, Wisdom & Bell, JJ.

D. Opinion, Wisdom, J., October 16, 1967

Suit by United States under 42 U.S.C. § 1971 against Dallas County, Alabama, alleging violation of black citizens' right to vote. During voter registration drives in 1963, Dallas County officials arrested and prosecuted many registration drive leaders and prospective voters who attended rallies, and also stationed police officers around buildings in which rallies were held. The Southern District of Alabama found no violation of constitutional rights. The United States appealed.

The Fifth Circuit, Wisdom, J., reversed, finding that all arrests and prosecutions and other activities by county officials were specifically for the purpose of harassing and intimidating prospective voters, in violation of 42 U.S.C. § 1971.

The Fifth Circuit found that plaintiffs were initially entitled to an injunction against prosecution of those arrested, and that, because such an injunction was not issued, the prosecutions had proceeded illegally.

"In order to grant full relief in this case, we must see that as far as possible the persons who were arrested and prosecuted in violation of section 1971(b) are placed in the position in which they would have stood had the county not acted unlawfully. . . . Of course no court order can completely eradicate the effect of the country's [sic] actions. If nothing else remains, the mental anguish and the nuisance of having to defend baseless prosecutions could well deter Negroes from participating in the registration process. The Court can and must, however, do all within its power to eradicate the effect of the unlawful prosecutions in this case."

The circuit court directed the Southern District of Alabama to return all fines and expunge all convictions from the records of the individuals prosecuted. It also ordered the county to reimburse those individuals for costs and attorneys' fees expended in their defense:

"The individuals so prosecuted would not have had to bear the costs of their defense had these prosecutions been enjoined as they should have been. The district court's

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300.46 (Cont'd)

order should therefore include a requirement that the county reimburse the individuals involved for the costs, including reasonable attorneys' fees, incurred in the defense of the state criminal prosecutions."

300.47 - Doe v. Swoap, ____ F. Supp. ____ (N.D. Cal. Oct. 26, 1973)

A. Civil Nos. 71-864 RFP, C-69-666 RFP

B. Counsel for Plaintiffs: California Rural Legal
Assistance (San Francisco,
Cal.)

C. Memorandum & Order, Peckham, J., October 26, 1973

Decision finding the defendants, officials of the California State Department of Social Welfare, in contempt of a consent order signed by the Northern District of California on July 18, 1972. In that consent order, the defendants had agreed that welfare applicants need not provide information as to the whereabouts of a parent absent from the home of a dependent child as a condition for welfare eligibility. The State Department nonetheless thereafter ordered county welfare departments to require such information, and to withhold welfare payments if the information was not supplied.

The Northern District of California, after declaring defendants in contempt, ordered them to purge themselves by (1) nullifying their order to county welfare departments, and (2) informing welfare recipients of the new policy. They were also ordered to locate and reimburse all persons who would have received welfare payments but for the contempt. The court then awarded plaintiffs' counsel, California Rural Legal Assistance, an *OEO Legal Services program*, costs and attorneys' fees of \$1,500, although CRLA had sought only \$1,000.

300.48 - *Farber v. Rizzo*, 363 F. Supp. 386 (E.D. Pa. 1973)

B. Counsel for Plaintiffs: Jack J. Levine (Philadelphia, Pa.)

Counsel for Defendants: Murray C. Goldman (Philadelphia, Pa.)

C. Opinion, Huyett, J., June 22, 1973

Opinion on a Petition for Civil Contempt filed by several demonstrators who were prevented, both before and after the entry of a TRO by the Eastern District of Pennsylvania, from peacefully demonstrating against President Nixon while he was in Philadelphia for a brief ceremony.

On October 20, 1972, the day on which Nixon was due to make a brief appearance at Independence Hall, at 7:15 a.m., sixteen persons were arrested by the Philadelphia Police Department when they refused to relinquish signs and protest banners or to move to a location a block away from Independence Hall. Lawyers for those sixteen persons went to court, and the court issued a TRO against further arrests at 12:40 p.m. In the meanwhile, sixteen more persons had been arrested. Even after police on duty at Independence Hall were informed of the TRO, they continued to arrest persons who sought to carry signs and demonstrate in areas open to the public.

The Eastern District of Pennsylvania, Huyett, J., found defendants in contempt for the arrests made after the TRO was entered, and also for keeping these arrested prior to the entry of the TRO in custody until 4:00 p.m., by which time Nixon had left. The court said:

"We consider this case a most serious one. It has brought before the Court a contempt for the law by those officials charged with maintenance of the law. Defendants - not only violated the First and Fourth Amendment rights of plaintiffs and others, but also they continued such actions in the face of a court injunction. While we are mindful of the difficulties with which policemen are faced in crowd situations, and this nation's tragic recent past, these concerns cannot be used as a smokescreen behind which government is permitted to suppress peaceful free expression. That is what defendants attempted and for that we must censure them."

The court thus found defendants in civil contempt, and awarded plaintiffs compensatory damages:

"Courts may award compensatory damages to plaintiffs who are deprived of constitutional rights. The value of such rights, while difficult of assessment, must be considered great." [Citations omitted.]

The court also awarded "reasonable attorneys fees and costs."

300.49 - *Donahue v. Staunton*, 471 F.2d 475 (7th Cir. 1972), *Rehearing & Rehearing En Banc Denied*, 471 F.2d 475 (7th Cir. 1972)

A. No. 71-1160

B. Counsel for Appellee: Lester Asher, Marvin Gittler
(Chicago, Ill.)

Counsel for Appellant: William J. Scott, Perry L. Fuller
(Chicago, Ill.)

C. Swygert, Hastings & Sprecher, JJ.

D. Opinion, Hastings, J., July 6, 1972

Suit under 42 U.S.C. § 1983 brought by a priest who had been dismissed as chaplain of Manteno State Hospital, a state mental institution, allegedly in violation of his first amendment rights. The seventh circuit, Hastings, J., affirmed the decision below which had ordered dismissed priest reinstated and awarded him \$2,000 punitive damages, \$750 attorneys' fees, and out-of-pocket expenses.

The circuit court found that plaintiff-appellee Donahue had been dismissed because of public statements he had made criticizing the hospital, and, while "some of the allegations made by the plaintiff were false or misleading . . . at the time of their issuance they were reasonably believed to be true by the plaintiff and were not knowingly false and recklessly made." Such statements as were false could easily have been refuted by the hospital administrators "by open and free public debate and discussion. Indeed, that is what freedom of speech is all about."

Defendants-appellants argued that, as agents of the State, they "were entitled to an immunity from any and all damages resulting from their actions." The circuit court, however, ruled that "'other officials [than legislators and judges] such as present defendants, retain only a qualified immunity, dependent on good faith action.' *McLaughlin v. Tilendis*, 398 F.2d 287, at 290 (7th Cir. 1968)." The court found that State defendants' actions were "without justification," and they were therefore not immune from money damages.

Nor were they immune from an assessment of attorneys' fees:

"The benefit to the general public, *i.e.*, of encouraging free and robust public discussion, is substantial in this case and should not depend for its protection upon the financial status of the individual who is deprived of his constitutional rights. Hence the relative financial positions of the parties at the time of the constitutional violation, which in the case at bar weighs in favor of allowing attorney fees, is relevant. There is also some evidence that the result of plaintiff's dismissal had a chilling effect upon public discussion of mental health care by employees at Manteno. And finally, although defendants' actions were not found to be egregious, they were consciously taken to stifle plaintiff's public criticism. . . . [W]e

[Continued]

300.49 (Cont'd)

hold the evidence weighs in favor of an award here and in doing so that the district court did not abuse its discretion."

Swygert, J., dissented, stating a belief that defendant-appellants were justified in dismissing plaintiff-appellee.

300.50 - *Welch v. Rhodes*, ____ F. Supp. ____ (S.D. Ohio May 8, 1973)

A. Civil No. 69-249

B. Counsel for Plaintiffs: William J. Davis, Irwin W.
Barkan (Columbus, Ohio)
Counsel for Defendants: James Laurenson (Columbus,
Ohio)

C. Order, Rubin, J., May 8, 1972

Class action under 42 U.S.C. §§ 1981 and 1983, alleging that state regulations and practices which permitted the selection of laborers for state construction projects from unions which excluded black members were unconstitutional, and seeking a declaration to that effect, as well as injunctions against continuation of such practices and regulations. No damages were sought. Four years later a consent order was signed by which the Governor of Ohio issued an Executive Order requiring affirmative efforts to hire blacks on state construction projects, "without admitting constitutional violations or violations of 42 U.S.C. Sections 1981 and 1983 or the Plaintiffs' right to obtain injunctive relief against the State"

Several months later, plaintiffs' counsel sought fees, which were not contested by the defendants except as to the amounts sought. Plaintiffs' counsel had not kept time sheets, so the court, stating it would be "difficult to award compensation on an hourly basis," considered "the nature of the litigation and the accomplishment of plaintiffs' counsel," and awarded \$7,500 fees against the State of Ohio.

Defendants thereafter filed a Motion to Reconsider under Rule 60(b), stating that the award of attorneys' fees by the district court was void because under the eleventh amendment the court was without jurisdiction to make such an award. On May 23, 1972, the court denied defendants' motion.

The case is now on appeal to the sixth circuit.

400.01 - *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968)

A. No. 339

B. Counsel for Petitioners: Jack Greenberg, James Nabrit, Michael Meltsner (New York City); Jenkins, Perry & Pride (Columbia, S.C.)

C. Opinion, Per Curiam, March 18, 1968

Petitioners had brought a class action under 42 U.S.C. § 2000a-3(b) against a chain of drive-in restaurants in South Carolina. The trial court found that the restaurants did discriminate against blacks, but also held that drive-in restaurants were not covered by Title II of the Civil Rights Act of 1964, and enjoined discrimination in only one of defendants' establishments -- not a drive-in restaurant. 256 F. Supp. 941 (D.S.C. 1966).

The fourth circuit reversed, holding that drive-in restaurants were covered by Title II. It remanded, with instructions that plaintiff-appellants should be awarded attorneys' fees "only to the extent that the respondents' defenses had been advanced 'for purposes of delay and not in good faith.' 377 F.2d at 437 (4th Cir. 1967)." 390 U.S. 400, at 401.

The Supreme Court granted certiorari "to decide whether this subjective standard properly effectuates the purposes of the counsel-fee provision of Title II of the Civil Rights Act of 1964." Its conclusion was that it did not.

The Court stated:

"When a plaintiff brings an action under [Title II] he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees -- not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II.

"It follows that one who succeeds in obtaining an in-

[Continued]

400.01 (Cont'd)

junction under that Title should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust. . . ."

400.02 - *Miller v. Amusement Enterprises, Inc.*, 426 F.2d 534 (5th Cir. 1970)

A. No. 27529

B. Counsel for Appellants: Johnnie A. Jones (Baton Rouge, La.); Norman Amaker, Jack Greenberg (New York City)
Counsel for Appellees: W. P. Wray, Jr., Bert K. Robinson (Baton Rouge, La.)

C. Brown, Thornberry & Morgan, JJ.

D. Opinion, Brown, C.J., May 13, 1970

Private litigants bringing suit under Title II of the Civil Rights Act of 1964, were denied injunctive relief by the trial court. 259 F. Supp. 523 (E.D. La. 1966)(West, J.). The fifth circuit panel affirmed, 391 F.2d 86 (5th Cir. 1967). On rehearing, the fifth circuit, *en banc*, held that the admitted discrimination complained of was covered by Title II of the Civil Rights Act, and remanded. 394 F.2d 342 (5th Cir. 1968). On remand, the district court refused to grant attorneys' fees to successful plaintiffs, because the law had been unclear up until the second decision of the fifth circuit, and, indeed, federal courts had twice ruled in defendant's favor.

Once again on appeal, from the denial of attorneys' fees, the fifth circuit reversed, finding that the trial court had abused its discretion.

"In our former decision we were not dealing with retroactive effect of a change in the law, we were dealing with the effect of a statute which was in force at the time of Appellee's racially discriminatory actions." 426 F.2d 536.

The question, then, was not about retroactivity, but whether the actions of appellee were covered by Title II of the Civil Rights Act. According to Judge West's reasoning, held the fifth circuit, a statute does not become effective until it is judicially interpreted, and the first violator brought into court cannot be held accountable for his violation because the law had not been judicially interpreted.

"A fictionalized approach which grants effectual absolution to the first defendant (civil or criminal) and makes a sacrificial lamb of the first victim is hardly acceptable." 426 F.2d 536.

Appellants' reliance on *Newman v. Piggie Park Enterprises*, no. 400.01, *supra*, is well founded. The Court's decision in *Newman* seems to be founded on (1) a "strong Congressional declaration of policy" and (2) the fact that effectuation of this policy was left largely in the hands of private parties. Also, Title II excludes recovery of damages as an available remedy.

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400.02 [Cont'd]

"Since Congress expressly denied damages, out of which contingent fees could be generated, as a sanction under Title II and yet committed effectual enforcement to individuals acting as 'private Attorneys General' whose status and economic resources would seldom permit such victims of forbidden discrimination to pay for legal counsel, it is clear that the statutory allowance of attorney fees . . . was a vital part of the whole scheme. To allow attorney fees only in 'exceptional' cases would therefore frustrate the congressional purpose." 426 F.2d 538 [footnotes omitted].

Appellees claim they acted in good faith, and this is a "special circumstance," on the basis of which fees should be denied. *Newman* stated, however, that good faith was not a "special circumstance," and the court therefore finds there are no special circumstances to merit the denial of attorneys' fees.

Appellees contend that fees should not be awarded because there is no showing that plaintiffs were obligated to pay their attorneys.

"What is required is not an obligation to pay attorney fees. Rather what -- and all -- that is required is the existence of a relationship of attorney and client, a status which exists wholly independently of compensation, as witness the effective service of counsel in the defense of criminal cases, the assertion of post-conviction habeas remedies and the now widespread organized services on behalf of the poor." 426 F.2d 538 [footnotes omitted].

The court remanded to the district court for a determination of the fee, which would cover all proceedings in the case, including appeals and remands.

400.03 - *Lea v. Cone Mills Corp.*, 438 F.2d 86 (4th Cir. 1971)

- A. Nos. 14068, 14069
- B. Counsel for Appellants: Robert Belton, J. LeVonne Chambers (Charlotte, N.C.), William L. Robinson (New York City)
- C. Boreman, Bryan & Craven, JJ.
- D. Opinion, per curiam, January 29, 1971

Appeals from an injunction against unfair labor practices issued by the Middle District of North Carolina, Stanley, J., under Title VII of the Civil Rights Act of 1964. 301 F. Supp. 97 (1969). The fourth circuit affirmed, modifying and remanding only as to attorneys' fees, which the district court had refused to allow.

The plaintiffs should not be denied fees merely because theirs was a test case, ruled the fourth circuit, because the plaintiffs did prevail, and did obtain substantial relief for the class of black women who might apply for jobs at Cone Mills.

Boreman, J., dissented in part, stating that plaintiffs would not have had to pay their attorneys in the absence of a court award of fees, and the trial judge had therefore not abused his discretion in denying fees.

* * *

Lea v. Cone Mills Corp., , ____ F.2d ____ (4th Cir. Sept. 11, 1972)

- A. No. 71-1852
- B. Counsel for Appellants: Robert Belton (Charlotte, N.C.)
Counsel for Appellees: Thornton H. Brooks
- C. Haynsworth, Winter & Young, JJ.
- D. Opinion, Haynsworth, J., September 11, 1972

Appeal from the award of only \$10,000 attorneys' fees in the above case on remand. The fourth circuit, Haynsworth, J., found that, although the trial court had not made specific findings of fact and conclusions of law, this did not call for automatic reversal under Rule 52(a), Fed. R. Civ. P. The fact did, however, "hamper" the circuit court's review of the situation, especially in view of the fact that Judge Stanley, the trial judge, had since died.

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400.03 (Cont'd)

Twelve lawyers representing the appellants claimed a total of 515 hours expended on the case. The court found that duplication of effort, especially with 12 lawyers working on the case, was probable, and affirmed the trial court's award. It also placed reliance on Judge Stanley's experience:

"Considering the number of lawyers involved, the indications of duplication of effort, Judge Stanley's expression of his view that some of the work would reasonably require less time than actually spent and his own observation of the work product and his capacity to evaluate it, we cannot conclude that a fee of \$10,000 was so unreasonably low as to be beyond the range of his discretion.

Judge Winter dissented, stating that he felt Rule 52(a), Fed. R. Civ. P., did require automatic reversal. He stated that the case could not be remanded to a deceased trial judge, and that "[j]udicial efficiency would seem to dictate that, if it is concluded that the district judge exceeded his discretion in fixing the fee, we proceed to a final determination of the case on the present record because we are as able to make it as a district judge who is new to the case and who has had no previous knowledge of what has transpired."

Judge Winter felt the district judge had abused his discretion in making so small an award. Plaintiffs had requested \$29,640, at \$40 per hour for office work and \$60 per hour for court work. "The district judge allowed \$10,000, which, if plaintiffs' claim of a total of 515 hours is accepted, means that plaintiffs' attorneys were allowed \$19.42 per hour for their services." Judge Winter would have disallowed 64 of the 515 claimed hours for duplication, thereby making an allowance for 451 hours.

"In the Middle District of North Carolina, the bar association's suggested *minimum* fee is \$30 per hour for routine office work, travel time and stand-by time in court (only 6 hours in plaintiffs' claim) and \$35 per hour for all other services. Certainly, this must be the beginning point in fixing the rate of compensation in this case. But other factors are relevant: The main action was one under new legislation involving novel issues. Plaintiffs achieved substantial success from their attorneys' efforts. They made new law which will affect the rights of many other persons. The novelty of the issues thoroughly warranted bringing counsel from more metropolitan and sophisticated areas where prevailing schedules of fees are more remunerative than those in the Middle District. Considering all of these factors, I do not see how counsel can fairly be compensated at a rate less than \$40 per hour.

For those hours which Judge Winter thought compensable, then, he would have increased the district court's award to \$22,040, plus a sum for processing this appeal, to total \$25,000.

- 400.03 -

400.04 - *Highway Truck Drivers and Helpers Local 107, of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Cohen*, 220 F. Supp. 735 (E. D. Pa. 1963)

A. No. 27053

B. Counsel for Plaintiff: Abraham J. Brem Levy (Philadelphia, Pa.)

Counsel for Defendants: Edward B. Bergman, Richard H. Markowitz (Philadelphia, Pa.)

C. Opinion, Body, J., August 21, 1963

Union members sued to prevent use of union funds for legal defense of union officials charged with defrauding the union. The plaintiffs won recovery of \$24,921.41 already spent, and an injunction against further expenditures. Plaintiffs then filed a motion under § 501(b) of the Labor-Management Reporting and Disclosure Act [LMRDA], 29 U.S.C. § 501(b), seeking to recover their own attorneys' fees and costs.

The Eastern District of Pennsylvania, Body, J., awarded plaintiffs \$470.90 costs and \$38,000 attorneys' fees, although the amount of recovery was under \$25,000, and although the recovery had not yet been made because the suit was on appeal.

In awarding the attorneys' fees, the court stated that, although § 501(b) of the Act called for "a reasonable part of the recovery" to be awarded successful plaintiffs in the discretion of the trial judge, Congress had not

"intend[ed] this phrase to be narrowly construed to mean that a part of the money recovery effectuated and no other benefits conferred should be considered 'recovery.' . . . '[R]ecovery' in the common meaning of the term means more than money. It means anything of value Recovery, therefore, must include the entire remedy effectuated and thus encompasses the total benefit conferred upon the Union through the efforts of counsel.

* * *

". . . [T]here is no question that the obtaining of the injunction in the first instance, and the sustaining of it on appeal, are a part of the benefit in and of itself, without regard to any specific monetary amount. Through this recovery the Union was foreclosed from paying counsel fees for defendants now or in the future under similar circumstances. The nature of the right secured is the paramount consideration.

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400.04 (Cont'd)

"In addition, a specific dollar benefit of \$24,921.41 has been recovered by the verdict. Also, weight will be given to the fact that this case is one of first impression and required more than usual efforts and skill on the part of counsel. . . .

"From all of the above and a careful review of this entire case I think that the Union has benefited although up to date there has been no money paid. The fact of benefit is enough. . . ."

The court also ruled that not only the hours spent, but the complexity of the litigation, should be considered in fixing a reasonable attorneys' fee:

"It is my opinion that the work performed by counsel has been well and carefully done. The litigation was of a most complex nature and one without precedent under the Act. Up to this writing it has been successful. So that the responsibility of counsel was of the highest degree and the desired result of the client was achieved.

"Although counsel has submitted a work sheet and detailed account of time in hours spent in the matter as of April 22, 1963, I do not consider that as controlling, or perhaps better said, determinative of what the fee should be, for the work of a lawyer is not comparable to the work of an artisan such as a plumber, or a bricklayer, or the like, where the time clock approach is controlling. Many times the final and winning decision of the lawyer as to what should or should not be done is not made at his desk or in his library but when he is elsewhere. The conscientious lawyer's mind is never at rest but works on and on until he arrives at what he thinks should be done."

400.05 - *Clark v. American Marine Corp.*, 320 F. Supp. 709 (E.D. La. 1970), *aff'd*, 437 F.2d 959 (5th Cir. 1971)

A. Civ. A. No. 16315

B. Counsel for Plaintiffs: Franklin E. White (New York City), Lolis Elie, A.M. Trudeau (New Orleans, La.)

Counsel for Defendants: Richard C. Keenan (New Orleans, La.)

C. Opinion, Rubin, J., April 24, 1970

Suit for award of attorneys' fees in a Title VII suit. The Eastern District of Louisiana, Rubin, J., ruled that plaintiffs should receive the \$20,000 attorneys' fees they sought, although plaintiffs were not awarded back pay. Although plaintiffs made no monetary recovery, "they skillfully and successfully attacked a pattern of covert discrimination in employment, on behalf of a class composed of the victims of the discrimination, and secured extensive relief."

"Litigants under Title VII can obtain damages, and they are in this respect different from those who invoke Title II. But where Title VII suitors act on behalf of a class and successfully seek and obtain injunctive relief, they are acting as agents of the national policy that seeks to eliminate racial and other unlawful discrimination in employment.

"Nor does it matter that some, or even perhaps a major part, of plaintiffs' counsel came from a lawyer who was on the staff of the NAACP Legal Defense and Educational Fund, Inc. The lawyers who filed this suit were Louisiana counsel engaged in private practice, members of the Louisiana State Bar and of the bar of this court; they were joined as co-counsel by a lawyer from New York who was admitted pro hac vice. The latter did in fact act as leading counsel. But the statute does not prescribe the payment of fees to the lawyers. It allows the award to be made to the prevailing party. Whether or not he agreed to pay a fee and in what amount is not decisive. . . . The criterion for the court is not what the parties agreed but what is reasonable.

"Congress certainly intended any award under the statute to be reasonable by traditional standards. It did not look, like Lear's jester, to the breath of the unfed lawyer, but considered that the prevailing litigant should be able to pay the laborer the worth of his hire.

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400.05 (Cont'd)

"There can be no doubt that the case required a large amount of time and labor. It involved interpretation of a new and difficult statute. The case was filed before many of the decisions cited in the court's eventual opinion had been reached. The issues required considerable skill to present, and the actual trial was relatively short only because, as a result of the many pre-trial conferences and elaborate pre-trial preparation, plaintiffs' counsel marshalled an impressive array of facts, skillfully analyzed them, and presented them lucidly. In less capable hands or with less preparation, the trial could well have lasted weeks. It would be an injustice not to mention the legal ability displayed by plaintiffs' lead counsel. As an advocate his skill in this case would rank him among the most able who have appeared before me in my three and a half years on the bench.

"There is no micrometer of reasonableness. But, on the basis of the evidence, a fee of \$20,000 [for 580 hours of work] appears to me to be proper. I don't think that the plaintiffs could hire a lawyer of equal skill on a contingent basis in New Orleans to do the job for less. It is true that counsel for the plaintiffs wrote counsel for the defendant and stated 'reasonable attorney fees' amounted to \$19,400. This omitted 'numerous minor matters' and it did not include two hearings at which evidence was taken with respect to the amount that should be allowed as attorneys' fees nor did it include the work of preparing for trial on this issue."

400.06 - *Thorn v. Richardson*, ____ F. Supp. ____ (W.D. Wash. Dec. 10, 1971)

A. No. 9577

B. Counsel for Plaintiffs: John Gant, Stephen M. Randels,
Christopher Young (Seattle,
Wash.)

Counsel for Defendants: William C. Collins, Stuart F.
Pierson

C. Opinion, Bowen, J., December 10, 1971

Class action challenging as a denial of equal rights the priority given male applicants over female applicants for entrance into the WIN program (job training program for welfare recipients). Defendants were four officials representing, respectively, the United States Department of Health, Education and Welfare, the United States Department of Labor, the Washington State Department of Health and Social Services, and the Washington State Department of Employment Security. The court found that DOL and DES are employment agencies within the meaning of Title VII of the 1964 Civil Rights Act, and that DSHS and DHEW are agents of DOL and DES.

The Western District of Washington, Bowen, J., held that defendants' regulations giving male applicants priority violated: (1) the Social Security Act, 42 U.S.C. §§ 602 et seq.; (2) Title VII of the Civil Rights Act of 1964; (3) the equal protection and due process guaranteed by the fifth and fourteenth amendments to the Constitution of the United States; (4) 42 U.S.C. § 1983; (5) Executive Orders 11246, 11375 and 11478, and the contract between DOL and DES which incorporated those Executive Orders; and (6) various provisions of Washington State law prohibiting discrimination on the basis of sex.

The court therefore enjoined continuation of the former priority schedules in the Washington State WIN program, and ordered various affirmative actions to correct the sex imbalance in the program brought about by those schedules.

The court ordered "equitable reimbursement" of expenses incurred by the two named plaintiffs, aggregating \$3,500; attorneys' fees of \$2,962.50; and costs; against both state *and federal* defendants. The court specified that HEW was to pay half, and DSHS half, of the assessment.

400.07 - *United States v. Gray*, 319 F. Supp. 871 (D.R.I. 1970)

A. Civil Action No. 4128

B. Counsel for Plaintiffs: Lincoln C. Almond, Joseph C. Johnston, Jr. (Providence, R.I.)

Counsel for Defendant: Kenneth M. Beaver (Providence, R.I.)

C. Opinion, Pettine, J., November 24, 1970

The United States brought suit under Title II of the Civil Rights Act of 1964, against a motel owner, alleging that he engaged in "a pattern or practice of discrimination against Negroes in admission to and use of the facilities of defendant's motel." At trial, 315 F. Supp. 13 (D.R.I. 1970), the defendant motel owner prevailed, and the suit then came on again, before the same court, on the issue of attorneys' fees.

At trial, the government conceded liability for the fee, on the basis of the statutory language, 1/ but claimed that the fee sought, \$15,000, was excessive. The court, Pettine, J., found that the legislative history of Title II, as well as the case of *Bell v. Alamatt Motel*, 243 F. Supp. 472 (N.D. Miss. 1965), 2/ supported defendant's claim that it should be awarded attorneys' fees for defending a meritless Title II action.

Defendant's counsel, a member of the Rhode Island Bar for 25 years, sought \$15,000 for some 230 hours in preparing and trying the case, plus \$14.60 for transportation and telephone costs, claiming that he relied on the minimum fee schedule of the Rhode Island Bar Association.

The court found

"In-determining the amount of the fee, it is proper to consider: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite properly to conduct the cause; (2) whether the acceptance of the employment in a particular case will preclude

1/ "In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person." 42 U.S.C. § 2000a-3(b).

2/ In the Civil Rights Act of 1964, Congress". . . expressed a purpose to discourage unmeritorious litigation. . . . [I]t was recognized that unmeritorious complaints under the Act could produce as serious a burden on commerce as the discrimination which it forbids, and that some measure of control should be vested in the courts toward the prevention of such a burden." 243 F. Supp. at 474.

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400.07 (Cont'd)

the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is reasonable expectation that otherwise he would be employed, or will involve the loss of other business while employed in the particular case or antagonisms with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client for services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. No one of these considerations in itself is controlling, nor is that enumeration of considerations necessarily complete. They are usually the principle [*sic*] guides in ascertaining the real value of the services." Canon 12, Canons of Professional Ethics of the Rhode Island Bar Association.

It also cited the American Bar Association:

"(B) . . . Factors to be considered as guides in determining the reasonableness of a fee include the following:

- "(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
- "(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
- "(3) The fee customarily charged in the locality for similar legal services.
- "(4) The amount involved and the results obtained.
- "(5) The time limitations imposed by the client or by the circumstances.
- "(6) The nature and length of the professional relationship with the client.
- "(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
- "(8) Whether the fee is fixed or contingent."

Canon 2, Code of Professional Responsibility of the American Bar Association.

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400.07 (Cont'd)

The court found that it was "reasonable to assume that defendant's business would have been seriously jeopardized, and perhaps even destroyed, by a finding by this court that defendant pursued a 'pattern or practice of discrimination' against Negroes. It further found that the fee should be based upon the "Rhode Island Bar Association minimum fee schedule plus a reasonable sum for all the other factors which it is permissible to consider."

The court therefore awarded attorneys' fees of \$11,391.25: \$6,623.75 for time charges (\$35.00 per hour); \$1,500 for 30 hours of trial at \$50.00 per hour; \$367.50 for argument of motions at \$35.00 per hour; and \$100 per hour for attendance fee, for \$400.00. Added to this was \$2,500, which the court found to be a reasonable amount "for all those other factors set forth in the Canons of Professional Ethics" and the other authorities.

400.08 - *Ratner v. Chemical Bank New York Trust Co.*, 329 F. Supp.
270 (S.D.N.Y. 1971)

A. No. 69 Civ. 4195

B. Counsel for Plaintiff: Jack Greenberg, Jonathan Shapiro,
Eric Schnapper (New York City)
Counsel for Defendant: Cravath, Swaine & Moore (New
York City)

C. Opinion, Frankel, J., June 16, 1971

Suit charging violation of the Truth in Lending Act, 15 U.S.C. §§ 1601 *et seq.* Plaintiff sued when his monthly Master Charge statement specified three different types of annual percentage rates of interest, and did not indicate which rate applied to him. Although plaintiff had incurred no finance charges on his account, the Southern District of New York, Frankel, J., ruled that plaintiff had standing to sue, and granted plaintiff's motion for summary judgment, postponing until a later date the questions of whether the suit was a proper class action and what costs and attorneys' fees, if any, should be awarded.

In granting plaintiff's motion for summary judgment, the court did so despite the bank's allegations that its action was unintentional error, and despite the fact that the named plaintiff had incurred no actual damages:

"The scheme of the statute, as both sides agree, is to create a species of 'private attorney general' to participate prominently in enforcement. The language should be construed liberally in light of its broadly remedial purpose.

". . . Congress made clear its broader scheme, and broader system of reimbursement, for private enforcement. It invited people like the present plaintiff, whether they were themselves deceived or not, to sue in the public interest. Following familiar precedents, it encouraged such actions by providing, in addition to the incentive of public service, costs and a reasonable attorneys' fee above the minimum recovery of \$100. . . ." [Footnote omitted.]
(See Appendix, pp. A-7, A-8, *infra*.)

* * *

Ratner v. Chemical Bank New York Trust Co., 54 F.R.D. 412 (S.D.N.Y. 1972)

A. Number and Counsel, See Above

B. Opinion, Frankel, J., February 14, 1972

Ruling on those questions reserved from the above decision, the Southern

[Continued]

- 400.08 -

400.08 (Cont'd)

District of New York, Frankel, J., found that the suit was not properly maintainable as a class action, and awarded damages of \$100 to the named plaintiff, plus attorneys' fees of \$20,000.

As to the class action, the court found (1) that as many as 130,000 people could have asserted the same claim as plaintiff, and had not; (2) that the one-year statute of limitations had long since run and the bank had been in compliance with the Act since December 1969; and (3) "the allowance of thousands of minimum recoveries like plaintiff's would carry to an absurd and stultifying extreme the specific and essentially inconsistent remedy Congress prescribed as the means of private enforcement. . . . [T]he proposed recovery of \$100 each for some 130,000 class members would be a horrendous, possibly annihilating punishment, unrelated to any damage to the purported class or to any benefit to defendant, for what is at most a technical and debatable violation of the Truth in Lending Act."

Despite the fact that the court refused to allow the class action, it found that plaintiff and defendant had previously agreed that "if plaintiff prevails in the end, he will be entitled to approximately \$20,000 attorney's fees as well as the minimum statutory recovery of \$100," and therefore awarded this amount to the named plaintiff.

400.09 - *United States of America v. Local Union No. 3, International Union of Operating Engineers*, ____ F. Supp. ____ (N.D. Cal. Nov. 8, 1973)

A. Civil Nos. C-71-1277 RFP; C-71-898 RFP; C-71-974 RFP and C-71-1515 RFP

B. Counsel for Plaintiffs: Sanford Ress (Palo Alto, Cal.)

C. Opinion, Peckham, J., Nov. 8, 1973

Three private and one United States action against the same defendant, alleging discrimination under Title VII of the 1964 Civil Rights Act, consolidated for trial.

Most of the matters in the suit, including back pay and prospective relief, were settled. Stipulated attorneys' fees were awarded plaintiffs in two of the three private suits. The only remaining question is an award of attorneys' fees in the third private action.

Plaintiff Perez was stipulated a "prevailing party" within the meaning of Title VII, and sought court determination of a reasonable attorneys' fee.

The Northern District of California, Peckham, J., awarded plaintiff \$40,000 attorneys' fees:

"It is appropriate to note at the outset that the availability of an attorney's fee award is quite an important aspect of the overall scheme of Title VII. As the court noted in *Newman v. Piggie Park*, 390 U.S. 400, 402 (1968), in an analogous context, awards of fees are critical to the enforcement of the civil rights acts.

"Once it is determined, or, as in the instant case, stipulated, that some award is appropriate, the size of the award depends to some significant degree upon the underlying policy of encouraging litigation under the Act. 'The amount of the award should not be such that it would discourage others from seeking to attack discriminatory practices.' *Schaeffer v. San Diego Yellow Cabs, Inc.*, 462 F.2d 1002, 1008 (9th Cir. 1962)." [Footnote omitted.]

The court then stated that, in addition to the above, traditional factors should guide the award, *e.g.*, the extent to which the plaintiff prevails, the time spent, the ability and experience of the attorney, the complexity of the issues involved, the customary fee charged for similar services in the area, the contingent fee nature of the representation, and "the contribution to the litigation of this plaintiff relative to that of the other plaintiffs."

The court ruled that:

(1) "the results accomplished by plaintiffs in this action have been

[Continued]

400.09 (Cont'd)

quite significant . . . [and] the extent to which plaintiffs prevailed should be considered complete."

(2) "[T]his case involved complexities of interpretation and fact-finding, even though it was not extraordinarily novel or difficult as compared with Title VII cases generally."

(3) "The risks of contingent litigation are increased when plaintiffs are without significant funds to cover costs, as many in public interest and civil rights litigation are, and when the law in the area may be unclear or conflicting. Especially in areas like Title VII there is an interest in having novel theories expounded and prior holdings extended, all of which increases the possibility that plaintiffs in a particular case may not prevail and that their counsel may not be paid. . . ."

". . . [R]ecruiting lawyers from the private bar to bring Title VII plaintiff's actions [is] extremely difficult in light of the uncertainties surrounding payment of fees and costs of litigation. The uncertainties are accentuated by the spectre of financially secure defendants with retained counsel vigorously opposing plaintiffs' every motion, and seeking to stop plaintiffs with motions of their own, all at staggering costs. . . . In this area of the law, awards of fees in Title VII litigation must not discourage plaintiffs from bringing suits to vindicate rights under that law."

(4) "The fact that plaintiff had help with the prosecution of this lawsuit should be weighed in determining an adequate attorney's fee. The purpose of the statute was fulfilled by the initiating of this lawsuit, and this the plaintiff himself did. The fact that the government later decided to file its own suit does not mitigate the salutary effects of a plaintiff's determining to vindicate his rights under the statute; denying reasonable attorney's fees because of the government's participation might well discourage filings by like-minded plaintiffs, however. . . . To the extent that the court perceived duplication of effort, the attorney's fee award is lessened."

Finally, the court stated that

". . . [w]ithout adequate fee awards in the Title VII area, the better lawyers will seek professional satisfaction and financial security elsewhere in the law, leaving to the less competent or to oblivion the vindication of rights whose enforcement Congress thought to be of the highest priority. In light of these considerations, the strong Congressional mandate under Title VII and other civil rights statutes, and the court's appraisal of the

[Continued]

400.09

work performed in this case, the court finds that attorney's fees in the amount of \$40,000 to plaintiff represents a reasonable award, calculated not to discourage other practitioners from taking up cases under Title VII." [Footnote omitted.]

400.10 - Jones v. *Seldon's Furniture Warehouse, Inc.*, 357 F. Supp. 886
(E.D. Va. 1973)

A. Civil Action No. 417-72-R

B. Counsel for Plaintiff: John M. Levy (Neighborhood Legal
Aid Society, Richmond, Va.)
Counsel for Defendant: G. Clinton Moore (Richmond, Va.)

C. Opinion, Merhige, J., April 25, 1973

Suit under the Truth-in-Lending Act, 15 U.S.C. §§ 1601 *et seq.*, wherein plaintiffs prevailed. The case then went up before the Eastern District of Virginia, Merhige, J., on a request for attorneys' fees to Legal Aid lawyers.

The Eastern District awarded plaintiffs attorneys' fees, stating:

(1) the case would warrant an award of fees to *private* attorneys because of the statutory language; and

(2) the award would not be for "attorneys' fees *qua* compensation," but would be for the purpose of having violators of a public policy shoulder the costs of enforcement and for the purpose of "encouraging the bringing of suits otherwise unprofitable to the Bar."

The court found "some conceptual difficulty . . . in applying the label of punishment to attorneys' fees, especially where punitive damages are available," but stated that the "punitive theory appears to be expressive of the shouldering of costs concept"

In the Truth-in-Lending Act, stated the court, "Congressional intent with regard to the importance of private enforcement is clear from legislative history . . . [and] legislative history is expressive of the need for a strong protective public policy with regard to credit transactions."

The court found that, if it awarded Legal Aid fees,

"Creditors will be placed on notice that consumers will have greater access to help from legal services projects, which by virtue of an award of fees might be freer to allocate their time to consumer credit cases. This in turn may more effectively influence creditors to avoid running afoul of the law."

The court also noted that an award of fees would supplement Legal Aid's coffers, but viewed this only as a side benefit:

". . . Undoubtedly many would view this support of legal services as a desirable side effect. However, any benefit gained by Legal Aid is not within the purview of the statute and therefore is unsupportive of the result here enunciated.

[Continued]

400.10 (Cont'd)

The Court is also mindful of Legal Aid's policy of non-involvement in fee generating cases. *See Buford v. American Finance Co.*, 333 F. Supp. 1243 (N.D. Ga. 1971), where the District Court withheld an award because of the local Legal Aid's policy not to accept fees." [Citations omitted.]

400.11 - *Jeanty v. McKey & Poague*, ____ F.Supp. ____ (N.D. Ill. Mar 3, 1973)

A. No. 73 C 675

B. Counsel for Plaintiffs: F. Willis Caruso, Patricia Banks
(Chicago, Ill.)

Counsel for Defendants: Raymond Groble, Taylor & Taylor

C. Opinion, Perry, J., May 3, 1973

Suit under the Fair Housing Act, alleging racial discrimination in apartment rental.

After a series of procedural problems, the defendants agreed to rent the apartment to plaintiffs, and submitted the question of damages to the court. The court found that plaintiffs had not acted in good faith and therefore awarded only \$100 in compensatory damages, and no punitive damages:

"... racial discrimination played a minor part in the refusal to rent to plaintiffs. The manner of testifying and conduct of plaintiff Marc Aurele Jeanty was such that any reasonable person would be justified in not renting to a person with his disagreeable and unstable personality. Accordingly, the court will not assess any punitive damages."

Plaintiffs' counsel sought \$2,220 attorneys' fees, but the court found that much of the work done was duplicative or otherwise unnecessary. The court also noted that plaintiffs' counsel were salaried employees of the Leadership Council for Metropolitan Communities, an organization funded by the United States Department of Housing and Urban Development. The court therefore concluded:

"Under all the facts and circumstances, and considering that plaintiffs' attorneys are already being paid by their employer, the court finds that a fair fee for all the necessary legal services rendered is \$100 for preparing and filing the suit and \$300 for trying the same, making a total of \$400 for attorneys' fees."

The court also awarded \$100 for 18 hours of investigative work, and \$86.64 out-of-pocket expenses.

The case is now on appeal to the seventh circuit.

400.12 - *Richardson v. Hotel Corporation of America*, 332 F. Supp. 519 (E.D. La. 1971)

A. Civil Action No. 70-826

B. Counsel for Plaintiff: Kendall L. Vick, John B. Wilkinson (New Orleans, La.)

Counsel for Defendant: David Andrew Lang (New Orleans, La.)

C. Opinion, Rubin, J., September 21, 1971

Suit under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e, *et seq.*, and 42 U.S.C. § 1981, alleging that plaintiff's dismissal as a hotel bellman because of a prior conviction of theft and receiving stolen property was racially discriminatory because more blacks than whites are convicted of serious crimes. Plaintiff had been hired as a bellman by the defendant hotel and was so employed for six months. Upon learning of plaintiff's prior conviction, defendants offered him a less "security-sensitive" position, which he refused. He was thereafter fired. Defendants claim that, because bellmen have access to guests' property, they have a "genuine business need" in having bellmen who are free from conviction of property-related crimes. The Eastern District of Louisiana, Rubin, J., agreed, holding that defendants were not guilty of racial discrimination because their actions were not racially motivated.

Defendants thereupon moved for attorneys' fees under Title VII, and the court refused to assess fees against the indigent plaintiff:

"What practical purpose such an award would serve in this matter is inscrutable, though it might conceivably serve as precedent *in terrorem* to discourage other Title VII plaintiffs.

". . . The statutory language may . . . be broad enough in terms to permit a successful defendant to recover attorney's fees, but . . . the award is discretionary with the court. The court finds that the award is not justified here for, so far as can be determined from the record, the plaintiff proceeded in good faith on the advice of competent counsel to attempt to vindicate statutory rights."

500.01 - *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939)

A. No. 543

B. Counsel for Petitioner: Harvey D. Eaton (Waterville, Me.)
 Counsel for Respondents: George P. Barse, James L. Robertson (Washington, D.C.), F. Harold Dubord (Waterville, Me.), Trevor V. Roberts (Philadelphia, Pa.)

C. Opinion, Frankfurter, J., April 24, 1939

Suit to recover money deposited in a trust fund in a bank which subsequently closed and went into receivership. The District of Maine, affirmed by the first circuit, ruled for the plaintiff but, because of procedural technicalities, denied attorneys' fees. On appeal, the Supreme Court held that the procedural technicalities did not bar attorneys' fees, and remanded to the district court to consider the question in accordance with the traditional power of equity courts.

The case is frequently cited for both the general (and unquestioned) power of equity courts to award attorneys' fees, and for the specific power of courts to consider benefits bestowed upon a group of people even when they do not constitute a class and when the suit was not a class action.

The Supreme Court's opinion included the following significant language:

"Allowance of [attorneys' fees] in appropriate situations is part of the historic equity jurisdiction of the federal courts. . . . To be sure the usual case is one where through the complainant's efforts a fund is recovered in which others share. Sometimes the complainant avowedly sues for the common interest while in others his litigation results in a fund for the group though he did not profess to be their representative. The present case presents a variant of the latter situation. In her main suit the petitioner neither avowed herself to be the representative of a class nor did she automatically establish a fund in which others could participate. But in view of the consequences of *stare decisis*, the petitioner by establishing her claim necessarily established the claims of fourteen other trusts pertaining to the same bonds.

[Continued]

500.01 (Cont'd)

"That the party in a situation like the present neither purported to sue for a class nor formally established by litigation a fund available to the class, does not seem to be a differentiating factor so far as it affects the source of the recognized power of equity to grant reimbursements of the kind for which the petitioner in this case appealed to the chancellor's discretion. Plainly the foundation for the historic practice of granting reimbursement for the costs of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation. Whether one professes to sue representatively or formally makes a fund available for others may, of course, be a relevant circumstance in making the fund liable for his costs in producing it. But when such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation -- the absence of an avowed class suit or the creation of a fund, as it were, through *stare decisis* rather than through a decree -- hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation. As in much else that pertains to equitable jurisdiction, individualization in the exercise of a discretionary power will alone retain equity as a living system and save it from sterility." 307 U.S. 161, at 164-67 [footnotes omitted].

500.02 - *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S.
714 (1967)

A. No. 214

B. Counsel for Petitioners: Moses Lasky
Counsel for Respondents: J. Albert Hutchinson

C. May 8, 1967

D. Warren, C.J.

A suit under the Lanham Act, 15 U.S.C. §§ 1051-1127, established deliberate infringement of a valid trademark. 15 U.S.C. § 1117 (section 35 of the Lanham Act) prescribes specific compensatory remedies for such infringement, and attorneys' fees are not among the enumerated remedies.

The trial court, on remand, awarded Fleischman \$60,000 in attorneys' fees, following a line of pre-Lanham Act cases and post-Lanham Act cases that rely on pre-Lanham Act cases. On appeal, the Ninth Circuit reversed, stating that district courts are powerless to award attorneys' fees under the Lanham Act. 359 F.2d 156 (1966). The Supreme Court, Warren, C.J., affirms.

Petitioners urge that the introductory phrase "subject to the principles of equity" in that portion of the Lanham Act which specified the remedies available to the injured party in trademark litigation "should be deemed implicit authority for an award of attorney's fees." But federal courts cannot ascribe to Congress an intent which is not obvious through either statutory language or legislative history. "When a cause of action has been created by a statute which expressly provides the remedies for vindication of the cause, other remedies should not readily be implied."

Stewart, J., dissents, on the basis of *A. Smith Bowman Distillery Inc. v. Schenley Distillers, Inc.*:

"Mere silence and inaction by Congress cannot be held to have repealed what has been found to be a well-established judicial power. Even though the Lanham Act may have been intended to be an integrated and comprehensive set of rules for trademark regulation and litigation to the exclusion of all conflicting rules, the retention of discretionary judicial power over the fixing of costs does not seem such a threat of inconsistency that it should by implication be held preempted or repealed by the Act. Some more positive action on the part of the legislature is necessary to indicate the Congressional intent to regulate what has long been an orthodox judicial function." 204 F. Supp. 374, 377 (D.C. Del. 1962) (Footnote omitted).

500.03 - *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970)

A. No. 64

B. Counsel for petitioners: Arnold I. Shure
Counsel for respondents: Albert E. Jenner, Jr.

C. Opinion, Harlan, J., January 20, 1970

Suit by minority stockholders alleging violation of 15 U.S.C. § 78n(a), (section 14(a) of the Securities Exchange Act of 1934), in that a merger of three corporations had been brought about through the use of materially misleading proxy statements. The district court had ruled for plaintiffs and had referred the case to a special master on the question of relief. The seventh circuit held, however, that, although the proxy statements had, in fact, been misleading, plaintiffs had not proved causation between the misleading statements and the merger.

Harlan, speaking for eight members of the Court, reversed the seventh circuit, and stated that monetary damages "should be recoverable only to the extent that they can be shown." The Court stated that on remand the district court should reimburse petitioners for expenses and costs already incurred by them.

On the question of attorneys' fees, the Court ruled that the absence of specific statutory authorization does not preclude an award of attorneys' fees. Distinguishing the Court's failure to award fees in *Fleischmann Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967), *supra* at No. 500.02, Harlan stated that the Lanham Act had contained so many express remedies for one whose trademark had been infringed that it implicitly precluded the additional remedy of attorneys' fees. The Securities Exchange Act contains no such specific list of remedies, and an equity court can therefore, in its discretion, award attorneys' fees.

The actions of minority stockholders here accrue to the benefit of a class (all stockholders, represented by the corporation), so attorneys' fees should be awarded even though a monetary "fund" has not yet been, and may not be, created. The minority stockholders involved in this suit have engaged in "corporate therapeutics" and have benefitted all shareholders "by providing an important means of enforcement of the proxy statute."

"In many suits under § 14(a), particularly where the violation does not relate to the terms of the transaction for which proxies are solicited, it may be impossible to assign monetary value to the benefit. Nevertheless, the stress placed by Congress on the importance of fair and informed corporate suffrage leads to the conclusion that, in vindicating the statutory policy, petitioners have rendered a substantial service to the corporation and its shareholders. Whether petitioners are successful in showing a need for significant relief may be a factor in de-

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500.03 (Cont'd)

termining whether a further award should later be made. But regardless of the relief granted, private stockholders' actions of this sort 'involve corporate therapeutics,' and furnish a benefit to all shareholders by providing an important means of enforcement of the proxy statute. To award attorneys' fees in such a suit to a plaintiff who has succeeded in establishing a cause of action is not to saddle the unsuccessful party with the expenses but to impose them on the class that has benefitted from them and that would have had to pay them had it brought the suit."

500.04 - *Sanders v. Russell*, 401 F.2d 241 (5th Cir. 1968)

A. No. 25797

B. Counsel for Petitioners: Jonathan Shapiro, Paul Brest, Marian E. Wright (Jackson, Miss.), John H. Schafer (Washington, D.C.), Melvyn Zarr, Jack Greenberg (New York City), Anthony G. Amsterdam (Stanford, California), William T. Coleman, Jr. (Philadelphia, Pa.)

Counsel for Respondents: R. L. Goza (Canton, Miss.), William Allain, Erskine W. Wells (Jackson, Miss.), John C. Satterfield (Yazoo City, Miss.)

C. Brown, Dyer & Garza, JJ.

D. Opinion, Dyer, J., September 18, 1968

Petitions for writs of mandamus to determine the validity of a court rule in the Southern District of Mississippi limiting appearances of out-of-state counsel in nonfee-generating civil-rights cases. The fifth circuit, *sua sponte*, ruled that lawyers in nonfee-generating cases may seek attorneys' fees:

"The limitation to non-fee generating cases does not preclude petitioners from seeking attorney fees in appropriate cases. The award of attorney's fees pursuant to Titles II and VII of the 1964 Civil Rights Act . . . is not in conflict with a policy of refusing to accept fees from clients." 401 F.2d 244, n.5.

500.05 - *Gibbs v. Blackwelder*, 346 F.2d 943 (4th Cir. 1965)

A. No. 9316

B. Counsel for Appellant: Richard M. Millman (Washington, D.C.)
Counsel for Appellee: *Pro Se*

C. Haynsworth, Boreman & Hutcheson, JJ.

D. Opinion, Haynsworth, J., June 2, 1965

Appeal from the Eastern District of Virginia, Lewis, J., which had denied plaintiff attorneys' fees in an action establishing the right of creditors (including plaintiff) of defendant Blackwelder to assert claim against extensive land holdings in his wife's name. The district court not only denied successful plaintiff attorneys' fees, but also taxed \$250 costs and fees against plaintiff's attorney, under Rule 37, Fed. R. Civ. P., for advising his client not to answer certain deposition questions (*See* Appendix A, *infra*).

The fourth circuit ruled that the district court was under a misapprehension when it stated, in its memorandum opinion, that

"[T]he fees here claimed would not go to the plaintiffs. They are for the attorneys. The plaintiffs have not asked that they be reimbursed for attorney fees incurred. In any event they would not be entitled to recover more than they had agreed to pay their attorneys and there is no evidence in this case what that amount is."

The fourth circuit stated, instead,

"that the request for the allowance of fees is for the benefit of the plaintiffs. It is founded upon the principle that when one who, while establishing his own claim, also establishes the means by which others may collect their claims, a chancellor in equity may award counsel fees to the trail blazer out of the property made available for the satisfaction of all claims. The principle is applied so that the one who led in hewing the path to victory is not left saddled with extensive attorney's fees, which need not be incurred by his more timid fellows who held back until the fruits of the pioneer's success were laid before them.

* * *

"The plaintiffs say that there are other creditors of the [defendant] who are now prepared to assert their claims, thus reaping for their own benefit the harvest the plaintiffs have cultivated through this litigation.

500.05 (Cont'd)

"Under these circumstances, equity would seem to require careful consideration of whether or not the plaintiff's attorneys in this action should be allowed reasonable fees payable out of the defendants' land, or its proceeds, so that the plaintiffs alone will not have to bear the burden of the major attorneys' fees for services which have redounded to the benefit of all of Mr. Blackwelder's creditors. This may be done by fixing a reasonable value upon the services rendered by the attorneys to all claimants who are creditors of Mr. Blackwelder and who may now obtain with relative ease the satisfaction of their claims out of the lands. The fees thus allowed should be credited by the attorneys against the contractual obligation of the plaintiffs to pay fees to them, so that, to the extent of the plaintiffs' contractual obligations for attorneys' fees, any allowance of fees out of the proceeds of the land will redound to their benefit and to their relief from the disproportionate burden of attorneys' fees they otherwise would bear in comparison with other creditors of the [defendant]."

The fourth circuit vacated that portion of the district court's memorandum opinion which disallowed attorneys' fees to successful plaintiffs, and remanded for "further proceedings not inconsistent with this opinion." The court stated that, if the district court on remand found that the amounts requested by plaintiffs' attorneys were "unreasonable and excessive" it could "disregard their suggestion and allow fees in an amount which the Court is satisfied is reasonable."

The circuit court described some of the circumstances of the case which could be taken into consideration in fixing a fee on remand:

"Mr. Blackwelder's conduct, unquestionably, made the task of the attorneys more difficult and the performance of their duties more onerous. This would tend to warrant the allowance of fees in a larger amount than would otherwise be appropriate. On the other hand, if the plaintiff's attorneys, themselves, made the litigation more complicated and costly than need have been, that, too, may be taken into account by a downward adjustment of the fees . . . in an amount approximating the costs unnecessarily imposed upon the other party. None of these things, however, is a reason for refusal to consider the allowance of any fees."

The circuit court also reversed the district court insofar as it had assessed costs and fees of \$250 against plaintiff's attorney, stating that Rule 37, Fed. R. Civ. P., provided that a party who was forced to go into court to obtain an order requiring another party to answer questions in a deposition be awarded the costs, including attorneys' fees, incurred by him in obtaining such an order. Because the defendants in the instant case did not seek such an order, they "incurred no costs and have paid no attorneys' fees for which they may be reimbursed under the provisions of Rule 37."

500.06 - *Office of Communication of the United Church of Christ v. Federal Communications Commission*, ____ F.2d ____ (D.C. Cir. March 28, 1972)

A. No. 24,672

B. Counsel for Petitioner: Albert H. Kramer (Washington, D.C.)
 Counsel for Respondent: Joseph A. Marino (Washington, D.C.)
 Counsel for United States: Robert B. Nicholson (Washington, D.C.)

C. Bazelon, Danaher & Robinson, JJ.

D. Opinion, Bazelon, J., March 28, 1972

The United Church of Christ, on behalf of various citizens' groups, filed with the Federal Communications Commission a petition to deny renewal of the license of station KTAL-TV in Texarkana, Texas, alleging that the licensee had ignored blacks in its programming. The licensee and citizens' groups subsequently reached an agreement on ways to correct the deficiencies in programming, and the Church then withdrew its petition to deny.

After the settlement was approved by the FCC, the Church submitted to the FCC for its approval a voluntary agreement by the licensee that it would reimburse the Church for its expenses, including attorneys' fees, of \$15,137.11. The FCC, however, refused to approve the reimbursement. Such reimbursements had frequently been approved in settlements between commercial competitors, but this was the first case involving a challenge by a citizens' group. The rationale for authorizing reimbursement in these situations, despite the lack of specific statutory authorization, had been that such reimbursement facilitated settlements, which settlements furthered both the public interest and the aims of the FCC.

The FCC did an about-face in this case, however, and stated that in no petition to deny situation would reimbursement be approved in the future. Its stated reasons were that the potential for abuse (inflated fees, the bringing of unmeritorious challenges, and settlements not in the public interest) outweighed the potential benefits to the public. In addition, the FCC found that, in this specific case, reimbursement was not a condition precedent to substantive settlement, and that such reimbursement was not *necessary* to the furtherance of public-interest goals (*i.e.*, settlement).

On petition for review, the District of Columbia Circuit, Bazelon, J., held that "reimbursement which *facilitates* withdrawal of competing or conflicting petitions is definitely in the public interest when termination of the litigation serves an overriding public interest goal." (Emphasis added.) Such reimbursement need not be necessary for settlement. The court stated that the

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500.06 (Cont'd)

strict scrutiny, on a case-by-case basis, of such settlements by the FCC would obviate the potential for abuse. Once the FCC has determined that the public interest is furthered by a settlement, and that "the public group seeking to withdraw is bona fide . . . voluntary reimbursement of legitimate and prudent expenses of the withdrawing group cannot be forbidden. The public interest therefore requires that the Commission's per se rule prohibiting reimbursement be overturned."

The D.C. Circuit also treated the question of reimbursement as a necessary corollary of the citizens' groups' right to participate in the licensing process, which had been established in *Office of Communication of the United Church of Christ v. Federal Communications Commission*, 359 F.2d 994 (D.C. Cir. 1966), and *Office of Communication of the United Church of Christ v. Federal Communications Commission*, 425 F.2d 543 (D.C. Cir. 1969), "which recognized the necessity of granting standing to public organizations before the Commission." The court found that reimbursement would be in the public interest, and that, without it, citizens' groups would not be able to participate and play the important role of improving licensees' service:

"In recent years, the concept that public participation in decisions which involve the public interest is not only valuable but indispensable has gained increasing support.

"It seems to us that the goal of facilitating public participation is necessarily furthered by the rule we have established Precisely because the appellant Church represented public organizations was it able to achieve a settlement with KTAL which served the public interest in Texarkana. When such substantial results have been achieved, as in this case, voluntary reimbursement which obviously facilitates and encourages the participation of groups like the Church in subsequent proceedings is entirely consonant with the public interest." [Citations omitted.]

The D.C. Circuit thus remanded the case to the Commission for its determination whether the expenses submitted by the Church were "legitimate and prudent," and should therefore be paid.

(Although the United States is a statutory defendant in cases against the Federal Communications Commission, the Justice Department refused to join the FCC, and, instead, filed a separate brief supporting the Church's right to reimbursement.)

500.07 - *Stafford v. Southern Farm Bureau Casualty Insurance Co.*,
457 F.2d 366 (8th Cir. 1972)

A. No. 71-1495

B. Counsel for Appellant: Sam Laser, Ralph R. Wilson
(Little Rock, Ark.)
Counsel for Appellee: Mike Huckabay (Little Rock,
Ark.)

C. Matthes, Lay & Ross, JJ.

D. Opinion, Per Curiam, March 20, 1972

Diversity action by insured against her insurance company. A jury found for plaintiff, and assessed liability at \$50,000. The Eastern District of Arkansas, Clary, J., reduced the liability to \$10,000 -- the maximum liability specified in the insured's contract with the company.

In a post-trial order, the Eastern District stated:

"Defendant did not have a case and was totally unreasonable, arbitrary and capricious in its failure to even offer to settle with plaintiff within the limits of the policy, and were it in this Court's power, under the laws of Arkansas, to affirm the jury's verdict of \$50,000, it would. Sadly, it cannot."

The court did, however, assess a penalty of \$1,200 against the defendant company, and, invoking *state* law, awarded plaintiff attorneys' fees of \$2,500, under Arkansas Stat. Ann. § 66-3238.

Defendant appealed. The Eighth Circuit affirmed, and awarded (under the same state statute) plaintiff-appellee a further attorneys' fee of \$500 for the appeal:

"Inasmuch as we are convinced that this appeal borders on the frivolous, we conclude that plaintiff should be allowed an additional attorney fee of \$500."

500.08 - *Ferrigno v. Ferrigno*, No. M 12,503-69 (Super. Ct. N.J. Ch. Essex County, June 11, 1971)

A. Docket No. M 12,503-69

B. Counsel for plaintiff: Robert L. Doris (Essex County
Legal Services Corporation)
Counsel for defendant: Philip Insabella

C. Opinion, June 11, 1971, Consodine, J.

Uncontested divorce action in which the sole question in dispute was the right of plaintiff to receive attorneys' fees.

The Chancery Division of the Superior Court of Essex County, Consodine J., held that, *although plaintiff's attorney was an employee of an OEO Legal Services organization*, plaintiff could recover attorneys' fees.

"Our Rule 4:42-9(a)(1) allows counsel fees in a matrimonial action in the discretion of the court. . . .

* * *

"The law is not static; it changes to meet changing social needs. A considerable number of divorces in New Jersey are now obtained by indigents represented by Legal Services attorneys. I do not believe that a defendant husband against whom a judgment for divorce has been awarded in a contested case should reap the benefits of free legal representation to his wife. Nor should a husband be encouraged to litigate under the assumption no counsel fee will be adjudged in favor of the indigent plaintiff represented by Legal Services. Put in another way, the public should be relieved from the financial burden of obtaining an indigent plaintiff's divorce or successfully defending against a husband's complaint to the extent that the husband is able to pay all or part of her attorney's fee. The taxpayer has an interest in recovering where possible a portion of the costs in these situations.

"Plaintiff is awarded a counsel fee of \$100 [the amount sought] payable to the Treasurer of the United States of America."

500.09 - *La Raza Unida v. Volpe*, ____ F. Supp. ____ (N.D. Cal. Oct. 19, 1972)

A. No. C-71-1166 RFP

B. Counsel for Plaintiffs: J. Anthony Kline (San Francisco, California)

C. Opinion, Peckham, J., October 19, 1972

Suit to enjoin the construction of a highway on the grounds defendants had not complied with various federal regulations concerning, among other things, housing displacement and relocation and environmental protection. The injunction was granted, 337 F. Supp. 221 (N.D. Cal. 1971), and plaintiffs now seek attorneys' fees in their successful litigation.

The court initially acknowledged its power to award the fees sought, should equity demand it. The court found no "obdurate obstinacy" on the part of defendants, and rejected as well an award based on an extension of the common fund doctrine. The court then turned to the "private attorney general" doctrine, which it stated as:

"whenever there is nothing in a statutory scheme which might be interpreted as precluding it, a 'private attorney-general' should be awarded attorneys' fees when he has effectuated a strong Congressional policy which has benefited a large class of people, and where further the necessity and financial burden of private enforcement are such as to make the award essential."

The court found that it should exercise its equitable discretion and award plaintiffs' counsel attorneys' fees under the above doctrine, based on three criteria:

(1) The suit effectuated congressional policies of the highest priority;

(2) The suit benefited not only the class bringing suit, but also, to varying degrees, all residents of California and the public in general:

"environmental protection, housing relocation, and highway construction are nearly everyone's business, and . . . almost all of society is better off when public policies in these areas have been strengthened"; and

(3) "Private attorneys general" were often necessary for effectuation of the public policies furthered by the suit:

"Responsible representatives of the public should be encouraged to sue, particularly where governmental entities are involved as defendants. As the amicus brief points out, only private citizens can be expected to 'guard the guardians.'"

500.09 (Cont'd)

"However, these exhortations towards citizen participation can sound somewhat hollow against the background of the economic realities of vigorous litigation. In many 'public interest' cases only injunctive relief is sought, and the average attorney or litigant must hesitate, if not shudder, at the thought of 'taking on' an entity such as the California Department of Highways, with no prospect of financial compensation for the efforts and expense rendered. The expense of litigation in such a case poses a formidable, if not insurmountable, obstacle.

"The only public entities that might have brought suit in this case were named as defendants in this action and vigorously opposed plaintiffs' contentions. Only a private party could have been expected to bring this litigation, and yet a private party is least able to bear the tremendous economic burdens. To force the private litigants to bear their own costs here would be tantamount to a penalty, and it seems somewhat inequitable to punish litigants who have policed those charged with implementing and following Congressional mandates. . . ."

While the court considered these three criteria a "sufficient basis" for its award of attorneys' fees, it added the following criterion:

"Unlike *Lee* [No. 300.01, *supra*], defendants in this motion are not private parties. Since the money will come from the state treasury the awarding of fees in the instant case will also serve the other objective of the *Mills* [No. 500.03, *supra*] decision -- matching, to the extent that the Court's jurisdiction over the matter makes possible, the costs and the benefits of litigation."
[Footnote omitted.]

In addition, the court ruled that "Congressional silence [in the statutes under which suit was brought] . . . is not a bar to the awarding of fees." It also specifically stated that the fact that the lawyers seeking fees did not accept fees from clients was no bar to a court awarded fee: "We cannot presume Congress intended to rely on tax-exempt foundations to fund costs of litigation in order to effectuate its policies, nor that such funding will continue in the future."

In a lengthy footnote, the court disposed of the question, raised in *Sincock v. Obara*, No. 100.09, *supra*, whether an award of fees against a state agency is barred by the eleventh amendment. After discussing that amendment and citing numerous cases, including *Sims v. Amos*, No. 100.10, *supra*, which awarded fees against state officers, the court concluded:

[Continued]

500.09 (Cont'd)

"Since we conclude as the court did in *Sims* that the state may no more immunize an individual from costs incident to an injunction than it may insulate him from the injunction itself, we find that sovereign immunity does not bar an award of attorneys' fees against Chief Engineer Legarra [one of the named defendants]. The State of California has provided that monetary claims or judgments against state officers, in such a situation, are reimbursable by the public entity which employed the individual. . . . As such the questions of sovereign immunity with respect to the other defendants have become largely academic."

Finally, the court granted plaintiffs' motion for expert witness fees, as the expert witnesses' testimony was helpful to the court and "a crucial part of the plaintiffs' presentation."

500.10 - *United States v. Gila River Pima-Maricopa Indian Community*, 391 F.2d 53 (9th Cir. 1968)

A. Nos. 21143, 21144

B. Counsel for United States: Raymond N. Zagone
Counsel for Defendants: A. Simpson Cox, Alfred S. Cox (Phoenix, Ariz.)

C. Jertberg, Duniway & Weigel, JJ.

D. Opinion, Duniway, J., March 6, 1968

The United States, in 1954, signed agreements (land permits) with the Gila River Pima-Maricopa Indian Tribe, whereby the United States was to use some 1350 acres of land until 1956. The United States agreed to restore the land to its original condition before termination of the permits, or to make a cash payment in lieu of restoration.

In 1957, however, without making the payments or restoring the lands, the United States condemned the land for an additional period of one to four years. When that condemnation period expired, the government once again condemned the land for successive terms of years, and the tribe sued.

The District Court for the District of Arizona, Craig, J., ruled that the government did not have to restore the lands or make a cash payment in lieu of restoration until it vacated the land, at which time damages could be assessed. It did, however, award the tribe its attorneys' fees, on the ground that 25 U.S.C. § 175, which allows for representation of Indian tribes by the U.S. Attorney, would be authorization for federal payment of a tribe's legal fees when the services of the U.S. Attorney were not available because of a conflict of interest. Because the U.S. Attorney could not represent both sides, the tribe had retained local counsel, on a contingent fee basis, under 25 U.S.C. §§ 81 and 82, which provide for retaining local counsel under a contract approved by the Secretary of the Interior when a tribe's suit involves the government.

The circuit court felt that 25 U.S.C. §§ 81 and 82

"... impose no liability for attorney fees upon the government. Section 175 does not do so either. We do not think that the courts can do so. Unless expressly provided for by statute, attorney fees cannot be awarded against the government." [Citations omitted.]

The Ninth Circuit therefore reversed the District Court's award of attorneys' fees to the Indian Tribe.

500.11 - *Pyramid Lake Paiute Tribe of Indians v. Morton*, ____ F. Supp. ____
(D.D.C. June 22, 1973)

A. Civil Action No. 2506-70

B. Counsel for Plaintiffs: Robert D. Stitser (Native American Rights Fund, Boulder, Colo.)

C. Opinion, Gesell, J., June 22, 1973

Environmental litigation aimed at preservation of Pyramid Lake.

The District Court for the District of Columbia, Gesell, J., found that "the record in this case establishes the strongest possible basis under decisions governing the discretion of an equity judge for the award of attorneys' fees and expenses." Listing the bases for awards, the court found:

(1) Disparate Resources - "The Pyramid Lake Paiute Tribe of Indians is impoverished . . . and the Tribe's legal expenses alone approximate its entire income."

(2) Breach of Fiduciary Obligation/Bad Faith -

"The Secretary of the Interior was shown to have breached his fiduciary obligation to the Tribe by a course of conduct which continued over a substantial period of time. This was to the severe detriment of the Tribe in a manner that cannot be financially compensated."

(3) Obdurate Obstinacy - "In the course of these proceedings, the Secretary's representatives acted in an obdurate and intransigent manner, refusing in good faith to carry out the Court's directives, and as a consequence unnecessarily extended the litigation to the detriment of the Tribe."

(4) Public Interest -

"The determinations made in this litigation not only benefited the Tribe but in many very real respects will enhance the public interest. The litigation has given added protection to the environment in and around Pyramid Lake and it has preserved a unique natural resource."

* * *

"Litigation of this character should not be burdened with expense, in order to encourage suits that so clearly enhance the public interest."

(5) Implementation of Congressional Policy -

"In its larger aspects [the case] has caused a significant implementation of national policy toward Indians and en-

[Continued]

500.11 (Cont'd)

couraged the continued viability of the Lake, thus assisting declared congressional policy."

Although the Government did not oppose the tribe's motion for attorneys' fees, the district court, Gesell, J., nonetheless ruled that 28 U.S.C. § 2412 (a statute normally held to preclude awards of attorneys' fees against the federal government in the absence of statutory authority to the contrary) was not a bar to an award of attorneys' fees in this particular instance. The court reasoned that 25 U.S.C. §§ 175 and 476, taken together, would be an authorization to award fees against the government. Section 175 authorizes the United States Attorney to represent Indian tribes, and section 476 authorizes the Tribe to employ outside counsel, "the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior." Because the Attorney General was originally a defendant, he could not represent the Tribe under § 175. Because the Secretary of the Interior was a named defendant, it would hardly be just to give him veto power over the counsel to be chosen by the Tribe and the amounts counsel would be paid under § 476. The two statutes together indicate, however, said the court, an "obvious intention of Congress to provide recognized Tribes with the services of the United States Attorney or the services of private counsel in terms approved by the Secretary." The court thus ruled:

"[T]he provisions of 28 U.S.C. § 2412 are not a bar to a claim by the Indian Tribe against the Secretary of the Interior based legitimately on the contention that the Secretary has breached his trust by unlawfully and improperly disposing of tribal assets, and . . . in effect, the statutes provide in such situations that an award of attorneys' fees and expenses of attorneys be made."

The court then passed on the reasonableness of the fees requested. All attorneys together logged a total of 2,834 hours, which the court discounted by 10 percent in view of the lack of success of part of the work done by the attorneys. The court found that one attorney, who was under contract with the Tribe, normally charged the Tribe \$30 per hour -- a sum less than his normal charges. The other attorneys, all employed by the Native American Rights Fund, were on salary and did not charge fees, and were therefore unable to provide the court with a normal time charge.

"The Court has determined to compute fees to be awarded at the rate of \$30 an hour for all attorneys, regardless of whether they did or did not log time in court. As all experienced attorneys realize, this charge, in the light of current conditions, is at the very bottom of the scale but the nature of the case and the circumstances under which the lawyers undertook the work justify the Court in fixing the fees at this bedrock minimum."

The court accordingly awarded a total of \$76,530 attorneys' fees, and an additional \$9,178.49 for attorneys' travel expenses, and \$20,488.72 for expert witness' expenses.

500.12 - *Woolfolk v. Brown*, 358 F. Supp. 524 (E.D. Va. 1973)

A. Civil Action No. 225-70

B. Counsel for Plaintiffs: John M. Levy (Neighborhood Legal Aid Society, Richmond, Va.)
Counsel for Defendants: Theodore Markow (Richmond, Va.)

C. Opinion, Merhige, J., April 23, 1973

Initially a class action under 42 U.S.C. § 1983, seeking to declare a Virginia "work rule" in contradiction to the federal Work Incentive Program (WIN). The court, in 1971, declared that the state work rule was "inconsistent with and interfered with the Congressional design of the WIN program." 325 F. Supp. 1162 (E.D. Va. 1971). The state thereafter passed another work rule, and plaintiffs sought to have the initial defendants declared in contempt of the court's 1971 decision.

The Eastern District of Virginia, Merhige, J., found the defendants in contempt of court, but found that equity prevented imposing any sanctions upon them. The court also refused to assess attorneys' fees against defendants, although defendants' conduct would warrant an award to *private* attorneys under the obdurate obstinacy standard. The court found that plaintiffs, represented by Legal Aid attorneys, were not due attorneys' fees in this particular action because there was no strong Congressional purpose involved, and because any award would have to be paid out of undisbursed welfare funds, and would therefore be paid by "the innocent victims of another's acts." If "malfeasant state administrators" had engaged in "personal, wilfull misconduct," held the court, attorneys' fees could have been taxed against them in their individual capacities, but no such misconduct was present in this case.

The court noted, however, that, even where plaintiffs are represented by Legal Aid,

" . . . it is arguable that in certain circumstances public policy may mandate that in any event the burden of legal services be shifted to the losing party either upon the principle that the costs of policy enforcement should be borne by those who violate said policy or for the purpose of encouraging private litigation by freeing litigants of the necessity to pay for legal services."

500.13 - *Sierra Club v. Lynn*, ____ F. Supp. ____ (W.D. Tex. May 21, 1973)

A. Civil Action No. SA72CA77

B. Judgment & Order, Spears, J., May 21, 1973
Order, Spears, J., June 28, 1973

Suit alleging that the Department of Housing & Urban Development [HUD] violated several Acts passed to protect the environment by approving a new development in Bexar County, Texas. After HUD had met a number of significant statutory requirements, the Western District of Texas, Spears, J., found that HUD was in full compliance with the laws involved, and that the developers could proceed to build the development, provided they abided by guidelines set down by HUD to protect nearby reservoirs from pollution. The court therefore denied all relief requested by plaintiffs. The court did, nonetheless, state that it would seriously consider awarding plaintiffs attorneys' fees:

"This Court is firmly convinced that even though the plaintiffs may have, at this stage, technically lost this lawsuit, nevertheless, a very important service has been performed in creating a greater public awareness of the dangers of pollution threatening this very valuable natural resource. Therefore, if it is appropriate under the law to award attorneys' fees to certain of counsel for plaintiffs in order to compensate them for their services rendered herein, consideration will be given to doing so."

In a subsequent order, on June 28, 1973, the court held that an attorneys' fee should be awarded because, although it had eventually upheld HUD's approval of the project, the plaintiffs had been instrumental in bringing about compliance with the reporting and study requirements of the various environmental laws. For example, although the defendants had already made an offer of commitment to the project at the time the suit was filed, they subsequently agreed, as the court noted, that the "Final Environmental Statement" upon which they had relied "is not in truth and in fact a 'final' statement as contemplated by law, and that additional information needs to be furnished." The court also pointed out the numerous meetings, studies, and reports which had occurred in the months following the filing of the suit, and which had formed the basis of the court's approval of the project. The court concluded that:

"In light of the reams of material published after this Court's Order of March 14th, it is difficult to conclude that the filing of the suit did not help to ensure that adequate precautions would be taken to protect South Texas' very valuable water resource and that the measures taken would be made available to the scrutiny of the public eye."

The court stated that it was

"of the belief that the position of the citizen plaintiffs is analogous to that of a plaintiff in a civil rights suit,

[Continued]

500.13 (Cont'd)

wherein it has been concluded that attorneys' fees should be awarded unless the trial court can articulate specific reasons for a denial.

* * *

"In this case, not only can no specific and justifiable reasons be articulated for the denial of attorneys' fees, but this Court is of the firm belief that equity dictates the award."

The award is also particularly appropriate, stated the court, in a situation such as this, where

"The burden of assuring full compliance with the national environmental policy . . . has fallen upon concerned citizens. The mere fact that there is no provision in the statute for the awarding of attorneys' fees will not be viewed as a bar to such an award."

The court found that it was barred from awarding fees against HUD or the Secretary of HUD by 28 U.S.C. § 2412, so, although it would like to "spread the cost of the award equally between San Antonio Ranch, Ltd. and HUD," it could not. It therefore taxed fees, to be determined in later proceedings, against the defendant San Antonio Ranch, Ltd.

600.01 - *Rolax v. Atlantic Coast Line R.R.*, 186 F.2d 473 (4th Cir. 1951)

A. No. 6167

B. Counsel for Appellants: Joseph C. Waddy (Washington, D.C.), Oliver W. Hill (Richmond, Virginia)
 Counsel for Appellees: Ralph M. Hoyt (Milwaukee, Wis.), William G. Maupin (Norfolk, Va.), Collins Denny, Jr. (Richmond, Va.)

C. Parker, Soper & Dobie, JJ.

D. Opinion, Parker, J., January 3, 1951

Black locomotive firemen filed suit under the Railway Labor Act to enjoin an agreement between the railroad and the union, which agreement deprived black firemen of seniority rights. Plaintiffs also sued for damages on account of violations of seniority rights which had already occurred.

The court below dismissed the plaintiffs' case on a procedural technicality, but taxed costs and attorneys' fees against defendants. 91 F. Supp. 585 (E.D. Va. 1950) (Hutcheson, J.). Plaintiffs and defendants filed cross appeals -- plaintiffs from the dismissal and defendants from the taxation of costs and attorneys' fees.

On appeal, the fourth circuit held that the union had violated its duty of fair representation to the black firemen, held that the case should not have been dismissed, and affirmed the district court's power to allow the firemen attorneys' fees:

"... In as much as the whole matter of taxation of costs will be before the lower court when final judgment shall be entered herein, we think it unnecessary to discuss the matter at this time, except to say that under the circumstances here we think that the allowance of attorneys' fees as a part of the costs is a matter resting in the sound discretion of the trial judge. Ordinarily, of course, attorneys' fees, except as fixed by statute, should not be taxed as a part of the costs recovered by the prevailing party; but in a suit in equity where the taxation of such costs is essential to the doing of justice, they may be allowed in exceptional cases. The justification here is that plaintiffs of small means have been subjected to discriminatory and oppressive conduct by a powerful labor organization which was required, as bargaining agent, to protect

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600.01 (Cont'd)

their interests. The vindication of their rights necessarily involves greater expense in the employment of counsel to institute and carry on extended and important litigation than the amount involved to the individual plaintiffs would justify their paying. In such situation, we think that the allowance of counsel fees in a reasonable amount as a part of the recoverable costs of the case is a matter resting in the sound discretion of the trial judge."

600.02 - *Burch v. International Association of Machinists & Aerospace Workers, AFL-CIO*, 78 L.R.R.M. 2442 (S.D. Fla. 1971), *aff'd*, 78 L.R.R.M. 3072 (5th Cir. 1971)

A. No. 68-109-Civ. WM

B. Counsel for Plaintiff: Hugo L. Black, Jr. (Miami, Fla.)
Counsel for Defendants: Plato E. Papps (Washington, D.C.), Manners & Amoon (Miami, Fla.)

C. Opinion, Mehrtens, J., February 3, 1971

Suit under Title I of the Labor-Management Reporting and Disclosure Act [LMRDA].

Plaintiff, who was President and General Chairman of District 145 of the International Association of Machinists and Aerospace Workers, AFL-CIO [Union], was terminated from membership in the Union because of his failure to pay dues, and, as a result, subsequently lost his job as President.

Plaintiff sued, and the court, Mehrtens, J., ruled that the cancellation of his union membership was arbitrary and discriminatory, in violation of 29 U.S.C. § 411(a)(1) (Title I of LMRDA, Bill of Rights of Members of Labor Organizations), because not all union members were terminated for failure to pay dues, and plaintiff's local therefore "followed no rational nor uniform standards."

The court then ruled that, because plaintiff had lost his position as President solely as a result of the illegal termination of his union membership, he was entitled to reinstatement and back pay of \$38,000.

The court also taxed attorneys' fees of \$3,000 against the Union, although there is no statutory authorization for attorneys' fees in cases alleging a violation of Title I of the LMRDA. The court reasoned that 29 U.S.C. § 412 gave it the jurisdiction

"... to render any relief appropriate by virtue of the infringement by the Defendant of Burch's rights to equal rights and privileges under Title 29, Section 411(a)(1) of the United States Code; including but not limited to reasonable attorney's fees. *See, e.g., Gartner v. Soloner*, 384 F.2d 348 (3d Cir. 1967); *Retail Clerks Union, Local 648 v. Retail Clerks International Association*, 299 F. Supp. 1012 (D.D.C. 1969)."

600.03 - *Burch v. International Association of Machinists & Aerospace Workers, AFL-CIO*, 78 L.R.R.M. 2444 (S.D. Fla. 1971)

A. No. 70-1780-Civ-WM

B. Counsel for Plaintiff: Hugo L. Black, Jr. (Miami, Fla.)
 Counsel for Defendant: Plato E. Papps (Washington, D.C.), Manners & Amoon (Miami, Fla.)

C. Opinion, Mehrtens, J., February 3, 1971

Suit under Titles I and III of the Labor-Management Reporting and Disclosure Act [Landrum-Griffin Act]. Plaintiff, unsuccessful seeker of nomination as candidate for President and General Chairman of District 145, alleged that the International Association of Machinists & Aerospace Workers [the Union] had violated: (1) 29 U.S.C. §§ 462 & 401(a)(1) & (2), by placing District 145 in trusteeship without adequate reason and without following proper procedures; and (2) 29 U.S.C. §§ 401(a)(1) & (2), by conducting nominating meetings for President and General Chairman in such a manner as to deny plaintiff and his supporters equal rights and privileges.

The court, Mehrtens, J., ruled that the Union had indeed violated §§ 462 and 401(a)(1) & (2) by placing the District in trusteeship without filing formal charges of mismanagement, and for purposes other than "correcting corruption or financial malpractice, assuring the performance of collective bargaining agreements or other duties of a bargaining representative, restoring democratic procedures, or otherwise carrying out the legitimate objects of the IAMAW." It therefore removed the District from trusteeship.

The court also ruled that nominations for President and General Chairman of the District had been illegally made, and that the plaintiff would have been a nominee had the votes been fairly tabulated. It therefore ordered that plaintiff replace another candidate (who would not have been named had the elections been fairly held) on the ballot.

Attorneys' fees were awarded successful plaintiff:

"The Plaintiffs have incurred an obligation to [their lawyers], for their services herein. A reasonable fee is \$2,000.00. An award of attorneys fees is appropriate in this case.

* * *

"Attorneys fees may be awarded in cases of this nature. *Gartner v. Soloner*, 384 F.2d 348 (3d Cir. 1967); *Retail Clerk's Union Local 648 v. Retail Clerk's International Association*, 299 F. Supp. 1012 (D.D.C. 1969); *Sands v. Abelli*, 290 F. Supp. 677 (S.D.N.Y. 1968)."

600.04 - *Blankenship v. Boyle*, 79 L.R.R.M. 2183 (D.D.C. 1972)

A. No. 2186-69

B. Counsel for Plaintiffs: Harry Huge, Edgar H. Brenner,
Thomas McGrew (Washington,
D.C.)

Counsel for Defendants: Paul R. Connolly, Paul M. Wolff,
John J. Wilson, Fred M. Vinson,
Jr., James F. Reilly (Washington,
D.C.)

C. Opinion, Gesell, J., January 7, 1972

Award of damages and legal fees following *Blankenship v. Boyle*, 329 F. Supp. 1089 (D.D.C. 1971). That suit, a derivative class action, proved a breach of fiduciary obligation on the part of the trustees of miners' welfare fund.

The district court, Gesell, J., held:

(1) Plaintiffs' estimate of \$17 million in damages "reflects a higher level of investment conduct than could reasonably be expected of a prudent trustee responsible for this particular Fund at the time," and the court therefore awarded compensatory damages of \$11.5 million,

"using as general guidelines an assumed investment in tax-free municipals, a rate of return of approximately five percent, with allowance for retaining uninvested on the books of the Fund a cushion in the range of \$3-\$5 million."

(2) No damages would be awarded for improper investment in certain utility stocks, because no complaint was registered against buying the stocks until they started to lose money.

(3) Attorneys' fees of \$825,000 would be awarded plaintiffs' attorneys, to be assessed against the \$11.5 million recovery "fund."

"[I]nasmuch as this action is in the nature of a derivative action, attorneys' fees should be assessed against the Fund for the recovery accomplished, which is in the interest of all the beneficiaries. Plaintiffs' counsel have maintained elaborate, careful records of time logged and expenses incurred and have presented these by appropriate applications which have been thoroughly reviewed. Since the fees are to be awarded against the Fund, no objection is raised by the Union or the Bank to the amount claimed. . . .

"As for attorneys' fees, 14,886 hours were logged which at time charges applied amounts to legal fees of \$661,000,

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600.04 (Cont'd)

or about \$45 per hour. Plaintiffs believe that regular time charges would not be equitable because of the monetary and equitable benefits obtained and the complex and somewhat novel issues of this case. The Court agrees. Counsel have shown skill and diligence and time charges are but one measure of the reasonableness of a fee. Since time logged on the equitable phases of the case was intimately related to the damage recovery and since the recovery was substantial, the Court has fixed a reasonable fee at \$825,000 for services performed to date. These fees are to be paid when the damages here assessed are paid to the Fund. A larger award could easily be justified by applying standards that have been used in comparable situations. The fact of the matter is that plaintiffs' counsel have not sought to profit unduly by their undertaking, which has gone forward in an effort to assist a widely scattered group of pensioners and other beneficiaries, none of whom are shown to have any financial substance. This approach to the fee question is commendable."

The court refused to apportion the damages among the four defendants, and instead assessed them jointly and severally against all four, "with provision for simple interest at the rate of six percent." The court also indicated that it would entertain a motion for a stay of money judgment by defendants, so long as it was understood that the six percent interest would run during the stay.

600.05 - *Gartner v. Soloner*, 384 F.2d 348 (3d Cir. 1967)

A. No. 16291

B. Counsel for Appellant: Joseph A. Malloy, Jr. (Philadelphia, Pa.)
Counsel for Appellees: Alan R. Howe (Philadelphia, Pa.)

C. McLaughlin, Ganey & Nealon, JJ.

D. Opinion, McLaughlin, J., September 1, 1967

Appeal from the Eastern District of Pennsylvania's denial of attorneys' fees under § 102 of the Labor-Management Reporting & Disclosure Act (LMRDA), 29 U.S.C. § 412.

Appellant had won injunctive relief for an improper fine and suspension imposed by appellees' violation of LMRDA §§ 101(a)(2) and 609, 29 U.S.C. §§ 411(a)(2) and 529, but the District Judge (Luongo) had "concluded that counsel fees could not be awarded under Section 102 [29 U.S.C. § 412]." The third circuit reversed.

Summarizing a number of cases which had not awarded counsel fees under Title I, and some which had, the circuit court found that none had really dealt with "the legislative intent in the LMRDA as to counsel fees. . . ."

"[I]ndeed, the specific language of Section 102, if anything, has been unwarrantably circumscribed. The Act gives the federal courts, in precise terms, the authority to dispense 'relief (including injunctions) as may be appropriate.' . . . [M]any forms of relief and costs have been recognized under Section 102, including: strike benefits, *Vars v. Int'l Bhd. of Boilermakers*, 215 F. Supp. 943 (D. Conn. 1963); punitive damages, *Farowitz v. Associated Musicians of Greater N.Y., Local 802, A. F. of M.*, 241 F. Supp. 895 (S.D.N.Y. 1965); injury to reputation with accompanying mental anguish, *Simmons v. Avisco, Local 713, Textile Workers Union*, 350 F.2d 1012 (4th Cir. 1965); and in this suit before the District Court plaintiff recovered 'legally allowable costs.'" [Footnotes omitted.]

The court, citing much legislative history of the Act, stated that "some members of Congress wished to provide expressly for counsel fees under Section 102. Other legislators indicated that such a provision might not be consistent with the broad powers given the courts to furnish relief 'as may be appropriate.'"

"Clearly Congress made no move to expressly limit or prescribe the scope of recovery under the enforcement section. Further, in spelling out remedies there is a danger that

[Continued]

600.05 (Cont'd)

those not listed might be proscribed with the result that the courts would be fettered in their efforts to 'grant relief according to the necessities of the case.' See *Fleischmann v. Maier Brewing Co.*, 386 U.S. 714 (1967).

"In deciding that counsel fees are proper items of recovery under Section 102 it is important that we have not found any prior decisions compelling a contrary conclusion. Most instances which have denied the relief sought here have relied too readily and too strongly on *Vars v. Int'l Bhd. of Boilermakers*, *supra*, for the proposition that the courts are without power to grant counsel fees under Section 102. We question that the District Court in *Vars* meant to be that restrictive; it at least seemed to indicate that exemplary damages might include an item for counsel fees where defendant's actions were motivated by wilful malice. Also, the court in *Vars* based its decision partly on the belief that counsel fees were not compensable damages. Recently the Supreme Court has indicated that such fees do constitute compensable damages. And we have the fact that other sections of the LMRDA which specifically call for the awarding of counsel fees in no way controls [*sic*] the legislative intent with respect to Section 102. In the instances where such awards are made the actions are narrowly defined to an examination of books and records under Section 201(c) and an accounting under Section 501(b). Neither section can be compared with an action to enforce a union member's bill of rights where the relief must be tailored to fit facts and circumstances admitting of almost infinite variety.

* * *

"[T]he scope of authority under Section 102 and the flexibility with which that power may be exercised is practically unlimited in view of the courts' legal and equitable jurisdiction. . . . The varieties of relief, among them the recovery of counsel fees, endemic to any exercise of equitable jurisdiction by our federal courts cannot be contravened. Justice Frankfurter made it clear that '[a]llowance of such costs in appropriate situations is part of the historic equity jurisdiction of the federal courts.' *Sprague v. Ticonic Bank*, 307 U.S. 161 (1939). Plainly the federal courts are empowered under Section 102 to come to the aid of any union member whose civil rights have been infringed upon by the union and to compensate that member for reasonable counsel fees and other expenses resulting from that Title I action.

[Continued]

600.05 (Cont'd)

". . . Section 102 of the LMRDA opens the door of the federal judicial system to the individual union member whose rights have been infringed upon except that stark reality might slam the door in that litigant's face when confronted with the insurmountable obstacle of prohibitive legal expenses. In construing the statute the court must consider the purpose of its enactment, the evil to be eradicated, the object to be obtained and recognize the construction that would best effectuate those standards. With this in mind, the interpretation reached by this Court is consonant with the Congressional desire of passing 'legislation that will afford necessary protection of the rights and interests of employees and the public generally.' In the context of the Labor Management Act it is untenable to assert that in establishing the bill of rights under the Act Congress intended to have those rights diminished by the inescapable fact that an aggrieved union member would be unable to finance litigation and would have no hope of remuneration even if he could some way or other proceed with his suit.

"As is revealed by its voluminous legislative history, in the heavy pressure atmosphere attending the creation of the Labor Managment bill of rights legislation there was a manifest reluctance to specifically detail the individual's right to reimbursement for counsel fees expended in defeating his union's effort to deprive him of his fundamental rights as a member. Nevertheless, the Congress was successful in protecting that right by giving such union member 'appropriate relief.' That phrase, while it avoided spotlighting the making available of necessary material assistance to a single unionist fighting his lonely battle for justice, did take care of the situation by means of the deliberately general language used. In the clear light of the latter, if the Congress had concluded to reverse its field and tear up the bill of rights it had drafted, it would have stated that there would be no counsel fees allowed. Absent this, 'appropriate relief' fairly construed must be held to include proper counsel fees." [Footnotes omitted.]

Reversed in part, and remanded "for further proceedings with respect to plaintiffs' application for counsel fees, in accordance with this opinion."

Nealon, J., dissented.

600.06 - *Sands v. Abelli*, 220 F. Supp. 677 (S.D.N.Y. 1968)

A. No. 61-Civ. 2110

B. Counsel for Plaintiff: Burton H. Hall (New York, N.Y.)
Counsel for Defendants: Henry J. Easton (New York, N.Y.)

C. Opinion, Cannella, J., August 28, 1968

Suit under §§ 101(a)(2), 102 and 609 of the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. §§ 411(a)(2), 412 and 529, to recover damages resulting from improper discipline by local union.

Plaintiff, now deceased, had charged the President of Local 442 and Business Agent of District Council 9, Brotherhood of Painters, Decorators & Paperhangers of America, with improper use of union funds. The Local President then had plaintiff blacklisted and removed from his position as Financial Secretary of the Local. The district court dismissed plaintiff's suit; the second circuit reversed, and directed assessment of damages. *Salzhandler v. Caputo*, 316 F.2d 445 (2d Cir. 1963).

On remand, the Southern District of New York, Cannella, J., made the following awards:

(1) back pay of \$1,625 for lost wages as Financial Secretary of the Local;

(2) compensatory damages of \$9,900 for loss of wages suffered as a result of plaintiff's "blacklisting";

(3) damages in the amount of \$1,000 for mental and physical suffering as a result of assault and battery on plaintiff by the defendant President (awarded not under the LMRDA, because there was no proof that the assault was a "direct and proximate result of the discipline" complained of, but under New York state law, invoking pendent jurisdiction);

(4) damages of \$2,500 for "mental suffering and humiliation";

(5) exemplary damages of \$6,000, "as a deterrent to those abuses which Congress sought to prevent"; and

(6) "under a broad interpretation of statutory language 'appropriate relief,'" \$5,000 attorneys' fees, although Title I of the Act does not specifically authorize such awards.

"[T]his Court . . . determines that it has discretionary power to award reasonable counsel fees under 29 U.S.C. § 412 (LMRDA § 102) to union members who have in good faith pursued their rights under Title I of the Act.

[Continued]

600.06 (Cont'd)

* * *

"The efforts of this plaintiff unquestionably resulted in a benefit to his union. To require him or his family to bear alone the financial burden of this litigation might discourage others in the labor movement from defending their rights.

"With reference to fixing an amount of counsel fees, the Court finds that the plaintiff in conducting this litigation, required the active assistance of counsel for a period of some seven years. During this period, counsel argued numerous motions, was involved in pretrial conference and procedure, conducted a trial, an appeal to the Circuit Court of Appeals where a reversal of the District Court's dismissal resulted, was returned to the trial calendar, sustained additional pretrial involvement, and a second trial."

600.07 - *Tiidee Products, Inc.*, 194 N.L.R.B. No. 198, 79 L.R.R.M. 1175 (1962)

- A. Nos. 9-CA-4440, -4488, -4536, -4563
- B. Counsel for Tiidee Products: Roy E. Brown (Akron, Ohio)
 Counsel for N.L.R.B.: Eugene B. Granof (New York, N.Y.)
 Counsel for Union: Melvin Warshaw (Washington, D.C.)
- C. Miller (Chairman), Jenkins, Fanning & Kennedy (Members)
- D. Decision, January 24, 1972

The Union (International Union of Electrical, Radio & Machine Workers, AFL-CIO) charged the Company (Tiidee Products, Inc.) with Taft-Hartley Act violations (*e.g.*, refusing to bargain collectively with union representatives; discriminating against union members; and discouraging employees from joining the union, etc.). The NLRB, 174 N.L.R.B. No. 103, found the Company in violation, and ordered specific forms of prospective relief, including collective bargaining and release of certain information.

Subsequently, the NLRB applied to the D.C. Circuit for enforcement of its order, and the Union, charging that the NLRB's order had granted inadequate relief, petitioned the D.C. Circuit for review. "The Union contend[ed] that the Board's use of its traditional 'remedy'-- a cease-and-desist order -- for a case of such intransigence bountifully and improperly rewards the Company for its transgression, and cannot be maintained as a faithful performance of the Board's task of 'devising remedies to effectuate the policies of the Act.'" *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953)." 426 F.2d at 1248.

The D.C. Circuit concluded:

"... that the Union makes a substantial contention, and that the Board has not, on the record before us, provided a satisfactory justification for its order.

"Section 10(c) of the Act, 29 U.S.C. § 160(c), requires the Board 'to take such affirmative action . . . as will effectuate the policies of this subchapter.'

* * *

"The 'affirmative action' clause of § 10(c) is not a mere charter of authority that the Board has the option to exercise or ignore. It is, as the Court has recently stated, a 'broad command.'" *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969).

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600.07 (Cont'd)

"We cannot discern, and the Board has not explained, on what basis it could or did conclude that its order under review is designed 'to insure meaningful bargaining.' . . . [A] prospective-only doctrine means that an employer reaps from his violation of the law an avoidance of bargaining which he considers an economic benefit. *Effective redress for a statutory wrong should both compensate the party wronged and withhold from the wrongdoer the 'fruits of its violation.'* *Montgomery Ward & Co. v. NLRB*, 339 F.2d 889 894 (6th Cir. 1965)." [Emphasis added.]

The circuit court, Leventhal, J., further reasoned that the Board's action "encourag[ed] frivolous litigation" before both the Board and the courts, and that not only the Union, but also competitors of the Company who complied with the statute, were aggrieved by the Company's actions, and the Board should therefore take *effective* remedial steps to ". . . prevent the employer from having a free ride during the period of litigation."

The circuit court granted the NLRB's petition to enforce its order, but also remanded the case to the Board pursuant to the Union's petition to review.

On remand, the NLRB "consider[ing] itself found by the [circuit] court's opinion as the 'law of the case,'" concluded "that it would effectuate the policies of the Act to grant some but not all of the requested additional relief."

The NLRB deemed a "make-whole order" impracticable, as it would be impossible to ascertain what salary levels would have been in effect had the Company negotiated, in order to award back pay at those levels. It also refused to appoint a Trial Examiner to formulate a make-whole formula for back pay, as this would result in long delay, and would therefore further benefit the Company (which, pending the examiner's decision, would not bargain collectively).

As "alternative remedies," however, the Board ordered the Company to give more information than normally required to Union members, and,

". . . in order to discourage future frivolous litigation, to effectuate the policies of the Act, and to serve the public interest . . . to reimburse the Board and the Union for their expenses incurred in the investigation, preparation, presentation, and conduct of these cases, including the following costs and expenses incurred in both the Board and court proceedings: reasonable counsel fees, salaries, witness fees, transcript and record costs, printing costs, travel expenses and per diem, and other reasonable costs and expenses . . . such costs to be determined at compliance stage of these proceedings."

The NLRB ordered this reimbursement even though "[n]ormally . . . litigation expenses are not recoverable by the charging party in Board proceedings

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- 600.07 -

TP2-147

though the public interest is served when the charging party protects its private interests before the Board."

In a concurring opinion, Miller (Chairman), stated:

"Since violation of our Act can be asserted only by private parties' charges, if they are forced to make such charges and to participate in extended proceedings by a respondent's frivolous resistance to the orderly application of our Act, I believe this to be a suitable remedy and one necessary for the protection of the public interest."

600.08 - *Retail Clerks Union, Local 648 v. Retail Clerks International Association*, 299 F. Supp. 1012 (D.D.C. 1969)

A. No. 1322-68

B. Counsel for Plaintiffs: Mozart G. Ratner, Sidney
Dickstein, George Kaufmann
(Washington, D.C.)
Counsel for Defendants: S. G. Lippman, Donald
Grody, George Murphy, Jon
Flinker, Carl Taylor (Washington, D.C.)

C. Opinion, Gesell, J., April 11, 1969

Suit under Titles I, IV and V of the Labor-Management Reporting and Disclosure Act [LMRDA], 29 U.S.C. §§ 411 et seq., 481 et seq., 501 et seq. Plaintiffs made allegations involving two violations of the LMRDA arising out of the first contested union election since 1944, in which an administration slate defeated members of the PRR (Reformation, Revitalization, Reconstruction) slate.

Plaintiffs allege that two former Vice Presidents of the Union, unsuccessful insurgent candidates for reelection, were improperly dismissed from their positions as Organizing Directors of the Union in retaliation for their opposition to the successful administration slate. The court found that: each of the two men had proved himself competent as an Organizing Director; neither man was "given a reason for his dismissal; and the dismissals came on the heels of "an acrimonious election campaign during which direct and subtle pressures had been used to discourage a successful challenge." It stated that, "[g]iven the overall purposes of the LMRDA, the burden shifts to defendants to justify the discharges which came so shortly after the ballots were counted," and then found that defendants' rationale for the discharges did not meet their burden of proving adequate justification. As relief, the court ordered: (1) reinstatement of the two men in their positions as Organizing Directors; (2) losses of pay and fringe benefits arising out of the illegal dismissals; and (3) "additional expenses incurred due to the dismissals."

Plaintiffs also sought attorneys' fees for this part of the suit, alleging that defendants' actions constituted a breach of trust, in violation of Title V of LMRDA, 29 U.S.C. §§ 501 et seq. The court found that "Title V's obligations encompass not only the proper handling of money and property but the protection of political rights as well," and that "it was not necessary that relief under § 501 of the LMRDA be in the form of a monetary recovery in order for a court to award attorney's fees."

"In the present case now before the Court, although the specific relief is the reinstatement of two individuals, the effect of such a ruling is to further the rights of free expression within the RCIA, thereby benefiting the Union and its members as a whole. Accordingly, since the discharges in the circumstances of this

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600.08 (Cont'd)

case also come under Title V, the Court will award plaintiffs and their attorneys such expenses and fees which are reasonable for the prosecution of this part of the lawsuit, the amount to be determined in subsequent proceedings."

Plaintiffs also alleged that the Union harrassed an insurgent committee which was responsible for the instant suit and for proceedings to have the election of the administration slate set aside. The court found that the committee's activities were proper, and enjoined the Union from interfering with those activities. The interference, as described in the opinion, was slight, and the court "in its discretion [did] not grant attorneys' fees for this phase of the litigation."

600.09 - *Local 4076, United Steelworkers of America v. United Steelworkers of America, AFL-CIO, Local 1465, United Steelworkers of America, and Woodings-Verona Tool Works*, 338 F. Supp. 1154 (W.D. Pa. 1972).

A. No. 70-486

B. Counsel for Plaintiffs: Louis P. Vitti (Pittsburgh, Pa.)

Counsel for Defendants: John H. Neely, A. E. Lawson,
Thomas H. M. Hough, Herman
L. Foreman, William J. LeWinter
(Pittsburgh, Pa.)

C. Opinion, Teitelbaum, J., January 27, 1972

Action under § 301 of the Taft-Hartley Act, 29 U.S.C. § 185, alleging a breach of the United Steelworkers' duty of fair representation and a breach of contract between an employer and a labor organization.

In 1967, the Woodings-Verona Tool Works (whose employees were represented by Local 1465) took over the Klein Logan Company (whose employees were represented by Local 4076). The Klein Logan employees were transferred to Woodings-Verona, Local 4076 was dissolved, and its members transferred to Local 1465. The question arose whether the seniority lines of the two locals should be merged or whether the former members of Local 4076 should start at the bottom of Local 1465's seniority list.

The question was submitted to binding arbitration, and the arbitrator ruled that the seniority lists should be merged, but the International Union interpreted the arbitrator's decision to place the former Local 4076 members at the bottom of the seniority lists.

The Western District of Pennsylvania, Teitelbaum, J., held that the International and Local 1465, by failing to enforce the arbitrator's award, had violated the duty of fair representation that they owed the former members of Local 4076:

"The award was unambiguous. It provided that the transferred Klein Logan employees were to be given credit for their full continuous service from July 23, 1931, for seniority purposes related to job and work opportunities. . . . Notwithstanding the clarity of both the award and the intention of the arbitrator, the United Steelworkers . . . emasculated the award by changing the date from July 23, 1931 to November 1, 1967. Thereby, all of the transferred Klein Logan employees were placed at the bottom of Woodings-Verona's November 1, 1967 seniority list."

The labor agreement negotiated by the union in October 1968 "presently deprives the transferred employees of their seniority rights."

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600.09 (Cont'd)

"In those negotiations, the United Steelworkers cannot be considered simply to have failed to secure for the members of former Local 4076 rights which were undermined and bargainable; it must be considered to have taken from those members that which had already been secured to them.

"We find that in the interpretation . . . and in the negotiation of the October 10, 1968 agreements the defendant United Steelworkers breached the duty of fair representation which it owed to the transferred Klein Logan employees. The absence of ambiguity in [the] award makes [the] interpretation, and its incorporation into the collective bargaining agreement . . . arbitrary and in bad faith. In fact, we deem the 'interpretation' to have made a mockery not only of the award, but also of the integrity of the principles of arbitration. . . ." [Footnotes omitted.]

The court, finding United Steelworkers mainly at fault, ordered the union defendants to restructure the seniority list to comply with the arbitrator's decision, and ordered all defendants to abide by this restructuring.

Although the court denied an award of compensatory damages or lost wages, it did award attorneys' fees, even though Section 301 of Taft-Hartley is silent on attorneys' fees, and courts have, in the past, refused to award them in suits under that section.

The amount of attorneys' fees awarded was settled at \$5,000 in an order entered on February 15, 1972, 338 F. Supp. at 1164. There, the court stated: "Although it is usual that counsel fees are awardable only if statutorily allowed, in suits such as the instant one, and in appropriate circumstances, counsel fees may be awarded absent express statutory authorization."

600.10 - *Yablonski v. United Mine Workers*, ____ F.2d ____ (D.C. Cir.
Aug. 3, 1972)

A. Nos. 24,560, 24,561, 24,562 & 24,563

B. Counsel for Appellants: John W. Douglas (Washington,
D.C.)
Counsel for Appellees: Paul R. Connolly (Washington,
D.C.)

C. McGowan, Wilkey & Gourley, JJ.

D. Opinion, McGowan, J., August 3, 1972

Consolidated appeals from denials of attorneys' fees in four cases instituted by plaintiff-appellant in the District Court for the District of Columbia under the Labor-Management Reporting and Disclosure Act [LMRDA].

The district court had denied fees in each of the four cases:

(1) a suit under §401(c) of the Act, 29 U.S.C. § 481(c), in which plaintiff obtained a preliminary injunction ordering election information disbursement through the mails by the Union;

(2) a suit under § 609 of the Act, 29 U.S.C. § 529, by which plaintiff obtained a preliminary injunction ordering his reinstatement in a position from which he had been removed as a result of his candidacy for President of the Union;

(3) a suit under § 401(c) of the Act, 29 U.S.C. § 481(c), wherein defendants, the incumbent Union leadership, were preliminarily enjoined from using the Union newspaper as a campaign tool; and

(4) a suit under §§ 401(c), 401(e) and 501 of the Act, 29 U.S.C. §§ 481(c), 481(e), and 501, seeking promulgation of rules that would assure a fair election. The Union voluntarily adopted two of plaintiff's proposed rules, and the district court withheld preliminary relief when defendants assured the court that they would voluntarily institute election rules conforming to plaintiff's requested reforms.

After the election, plaintiff's counsel filed motions for counsel fees in all four cases. The district court dismissed as moot the first three cases, and denied plaintiff's request for fees in all four. The court denied fees because it inferred a congressional intent to bar the recovery of attorneys' fees in actions under those sections of LMRDA which did not specifically authorize such relief. The court also reasoned that the benefit theory should not apply, because, although the entire membership of the Union benefited, the primary purpose of the suits was to help plaintiff himself in his bid for the Union presidency.

The D.C. Circuit reversed, and remanded for an assessment of fees, finding it

600.10 (Cont'd)

"unlikely that the Congressional perceptions of the needs for greater democracy and fair dealing in internal union affairs, which sparked the passage of the LMRDA, did not extend as well to the vital role of the equity powers of the judiciary in meeting those needs."

The circuit court cited *Gartner v. Soloner*, No. 600.05, *supra*, as precedential authority for an award of attorneys' fees, and *Mills v. Electric Auto-Lite Co.* No. 500.03, *supra*, as authority for awarding counsel fees absent express statutory authorization, despite the fact that other sections of the same act do contain such authorization.

The court then stated that, although plaintiff's main purpose may have been to forward his own interests, "[t]he relevant question is whether or not the trouble he takes results in the actual conferring of benefits on others than himself." Finding that plaintiff's suits had indeed benefited both present and future members of the class of Union members, particularly as regards greater Union democracy (the express intent of the Act), the court chose to reverse.

One final matter dealt with was the defense's contention that attorneys' fees should not be imposed "in cases which have never reached final adjudication on the merits." Citing *Mills*, the circuit court found:

"It is not decisive in this instance that three of the suits never got beyond the issuance of preliminary injunctions, and the fourth failed even to do that. The fact is that in the former three cases the preliminary injunction was the critical step and procured all the relief required; and in the fourth case the very filing of the complaint and the holding of a hearing on the motion for a preliminary injunction effected a change of position by the defendants which warranted the court's conclusion that no mandatory order was necessary to achieve the plaintiff's aims. As all lawyers know, a lawsuit does not always have to go to final adjudication on the merits in order to be effective. Assuming the effectiveness in terms of practical results, the litigating stage attained is relevant only to the amount of the fees to be allowed, and not to the issue of whether they should be awarded at all."

600.11 - *Cole v. Hall*, 462 F.2d 777 (2d Cir. 1972)

A. No. 615, Docket 72-1003

B. Counsel for Plaintiff-Appellee: Burton H. Hall (New York City)
Counsel for Defendant-Appellants: Schulman, Abarbanel, Perkel & McEvoy (New York City)

C. Clark, Lumbard & Tyler, JJ.

D. Opinion, Clark, J., June 22, 1972

Suit under the free speech provisions of the Labor-Management Reporting and Disclosure Act [LMRDA], initially brought in 1964, to reinstate plaintiff as a member of the Seafarers International Union of North America. Defendants were temporarily enjoined from expelling plaintiff *pendente lite*. The case came to trial five years later, and the Eastern District of New York ordered plaintiff permanently reinstated to membership in the union, with all financial benefits of membership restored. The court denied plaintiff damages, but did grant attorneys' fees in the stipulated amount of \$5,500.

Defendants appealed to the second circuit, which affirmed, stating that Cole's behavior was, indeed, protected by the LMRDA free speech provisions, 29 U.S.C. §§ 411(a)(2), 411(a)(5), and he was therefore entitled to individual injunctive relief.

The union vigorously opposed the district court's award of attorneys' fees under § 102 of the Act, 29 U.S.C. § 412, arguing mainly that such awards are not authorized by that section of the Act, while other sections of the Act do specifically provide for awards of attorneys' fees. The circuit court, however, affirmed the district court's award:

" . . . [T]he Act clearly protects the right of members of labor unions 'to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views . . . upon any business properly before the meeting' Cole was exercising this very right and was expelled for it. This case -- as well as a host of others -- attests to the unions' propensity to deprive members of their rights of free speech. The Congress recognized this right as vital to the independence of the membership and the effective and fair operation of the union as the representative of its membership. When Cole brought this suit, he was not vindicating his rights of free speech alone but those of every member of the union as well. Indeed, his success in maintaining this right at union

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600.11 (Cont'd)

meetings inured to the benefit of union members everywhere. This action by Cole was therefore of substantial benefit to all of the members of the union. In vindicating his right, he vindicated their right. . . .

"These benefits to the union and the labor movement would be lost in most instances without the discretionary authority in courts to grant counsel fees. Indeed, cases vindicating such rights would never be filed. . . . The record shows that it took six months for Cole to secure his temporary injunction, largely because of the dilatory action of the union and its officers; seven years to get his trial and now two years to obtain the final vindication of a right not only specifically secured to him in the Act itself but fundamental to a free society as well. Had it not been for the devotion of his counsel largely on a *pro bono publico* basis, Cole would not have ever attained this basic right. Not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose. It is difficult for individual members of labor unions to stand up and fight those who are in charge. The latter have the treasury of the union at their command and the paid union counsel at their beck and call while the member is on his own. Congress passed the Act in an effort to offset the heavy hand of the union by giving the union member the aid of the federal courts. It is true that it did not specifically grant counsel fees, but it did authorize the courts to grant 'such relief as may be appropriate.' Counsel fees in cases of this kind are not only appropriate, they are imperative to preserve the Congressional purpose. An individual union member could not carry such a heavy financial burden. Without counsel fees the grant of federal jurisdiction is but a gesture for few union members could avail themselves of it. It is but equitable and fair that counsel fees in appropriate cases be awarded just as the union pays those of the officers and of itself in Section 102 litigation. . . .

". . . As we see it, the supporters of the Bill [LMRDA] thought that its language was so broad that it would give 'a wide latitude to grant relief according to the necessities of the case,' to cover 'any loss suffered by a member.' [Citing to legislative history.] This is sufficient for us to include the awarding of counsel fees here. It is quite often necessary to graft a judicial remedy to give legislation its intended fruition.

"The union . . . argues that . . . counsel fees are specifically provided for in other sections of the Act, 29

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600.11 (Cont'd)

U.S.C. §§ 431(c), 501(b), thus suggesting that they were consciously omitted from this section. But this is a *non sequitur* here. . . . Here the relief necessary cannot be as easily foreseen nor broadly specified which accounts for the unlimited language of the Congress in § 102 *i.e.* 'such relief as may be appropriate.'

"The union argues finally that . . . it was an abuse of the district court's discretion [to grant fees] here because appellee's services were furnished *gratis*. We need not consider this argument, since the record shows that, rather than the A.C.L.U. bearing any of the cost, Cole and his counsel bore the cost of the litigation themselves."

* * *

Hall v. Cole, 412 U.S. 1 (1973)

A. No. 72-630

B. Counsel above

C. Opinion, Brennan, J., May 21, 1973

In affirming the above award of attorneys' fees, Brennan, joined by Burger, Douglas, Stewart, Blackmun and Powell, JJ., reaffirmed *Sprague Ticonic National Bank*, 307 U.S. 161 (1939), and *Mills v. Electric Auto Lite Corp.*, which held that attorneys' fees should be awarded where necessary "to do equity in a particular situation," 307 U.S. 161, 166 (1939), or to comply with "overriding considerations [which] indicate the need for such a recovery." 396 U.S. 375, at 391.

The Court noted that fees are awarded in cases of obdurate obstinacy, in which case "the underlying rationale of 'fee-shifting' is, of course, punitive" In this case, however, the Court chose to uphold the fee award on the basis of the "common benefit" which this lawsuit had conferred "on the members of an ascertainable class" (citing *Mills v. Electric Auto Lite*, *supra*, at 393.) The Court reaffirmed its holding in *Mills* that the "common benefit" need not be monetary, but could consist of prevention or correction of abuses to the class members.

The Court chose the "common benefit" rationale as particularly appropriate to the instant case, finding it "clearly governed" by *Mills*:

"[T]here can be no doubt that, by vindicating his own right of free speech guaranteed by § 101(a)(2) of Title I of the LMRDA, respondent necessarily rendered a substantial service to his union as an institution and to all of its members. When a union

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600.11 (Cont'd)

member is disciplined for the exercise of any of the rights protected by Title I, the rights of all members of the union are threatened. And, by vindicating his own right, the successful litigant dispels the 'chill' cast upon the rights of others. Indeed, to the extent that such lawsuits contribute to the preservation of union democracy, they frequently prove beneficial 'not only in the immediate impact of the results achieved but in their implications for the future conduct of the union's affairs.' *Yablonski v. United Mine Workers of America*, ___ U.S. App. D.C. ___, 466 F.2d 424, 431 (1972). Thus, as in *Mills*, reimbursement of respondent's attorneys' fees out of the union treasury simply shifts the cost of litigation to 'the class that has benefited from them and that would have had to pay them had it brought the suit.' *Mills v. Electric Auto Lite Co.*, *supra*, at 397. We must therefore conclude that an award of counsel fees to a successful plaintiff in an action under § 102 of the LMRDA falls squarely within the traditional equitable power of federal courts to award such fees whenever 'over-riding considerations indicate the need for such recovery.' *Mills*, *supra*, at 391-392." [Footnote & citations omitted.]

The Court distinguished *Fleischmann Distilling Corporation v. Maier Brewing Co.*, 386 U.S. 714 (1967), as involving a statute in which numerous specific remedies for violation are listed. Section 102 of the LMRDA, 29 U.S.C. § 412, however, authorizes "such relief (including injunctions) as may be appropriate," and such broad language cannot imply "an intent to deny to the courts the traditional equitable power to grant counsel fees" Nor, the Court ruled, does the fact that other sections of the LMRDA specifically authorize attorneys' fee awards preclude an award under § 102, which is silent as to attorneys' fees. Those portions of the LMRDA which do authorize attorneys' fees, reasoned the Court, deal with very specific problems and limited remedies.

"By contrast, § 102 was premised upon the fact that Title I litigation necessarily demands that remedies 'be tailored to fit facts and circumstances admitting of almost infinite variety,' *Gartner v. Soloner*, 384 F.2d 348, 353 (3d Cir. 1961) and § 102 was therefore cast as a broad mandate to the courts to fashion 'appropriate' relief. Indeed, any attempt on the part of Congress to spell out all of the remedies available under § 102 would create the 'danger that those [remedies] not listed might be proscribed with the result that the courts would be fettered in their efforts to 'grant relief according to the necessities of the case.' *Id.*"

The Court also took note of several comments in the legislative history of § 102 which indicated that certain Congressmen desired inclusion of an attorneys' fee provision in Title I. Respondents had cited these comments as indicating the nonavailability of fees under the Title as it presently stands. The

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600.11 (Cont'd)

Court ruled that it would be

"'untenable to assert that in establishing the bill of rights under the Act Congress intended to have those rights diminished by the unescapable fact that an aggrieved union member would be unable to finance litigation. . . ." *Gartner v. Soloner, supra*, at 355. We therefore hold that the allowance of counsel fees to the successful plaintiff in a suit brought under § 102 of the LMRDA is consistent with both the Act and the historic equitable power of federal courts to grant such relief in the interests of justice." [Citations omitted.]

The Court also dismissed petitioners' allegation that respondent was acting in bad faith because motivated by his desire to seek office within the union, finding that Title 1 was meant to protect respondent's right to run for office, and his exercise of that right could hardly be deemed bad faith.

Finally, the Court held that defendants' contention that they were acting in good faith, and could not therefore be taxed fees, was irrelevant under the "common benefit" theory:

"[A]lthough the presence of 'bad faith' is essential to 'fee-shifting' under a 'punishment' rationale, neither the presence nor absence of 'bad faith' is in any sense dispositive where attorneys' fees are awarded to the successful plaintiff under the 'common benefit' rationale recognized in *Mills* and operative today. Under that theory, counsel fees are granted, not because of the 'bad faith' of the defendant but, rather, because the litigation confers substantial benefits on an ascertainable class of beneficiaries. In that situation, the element of 'bad faith' of the defendant is simply one of many considerations best addressed to the sound discretion of the District Court. 23/

"23/ Another such consideration is, of course, the extent to which the payment of the plaintiff's counsel fees out of the union treasury might impair the union's ability to operate effectively. Here, petitioners do not, and indeed cannot, contend that the award of only \$5,500 would in any sense jeopardize union stability."

The Court also parenthetically noted that, because it decided the case on the common benefit rationale, it would not reach the question of the private attorney general rationale, which was another rationale offered by respondent.

600.12 - *Cefalo v. International Union of District 50 United Mine Workers of America*, 311 F. Supp. 946 (D.D.C. 1970)

A. Civil Action No. 3616-69

B. Counsel for Plaintiffs: Stephen Daniel Keefe, John H. Frye, III (Washington, D.C.)
Counsel for Defendants: J. C. Wells, Jack Weiner (Washington, D.C.)

C. Opinion, Parker, J., March 25, 1970

Suit under the Labor-Management Reporting and Disclosure Act [LMRDA], Title I, §§ 101(a)(1), 101 (a)(2), 102; Title IV, §§ 401(e), 401(g); Title V, §§ 501(a), 501(b); and Title VI (29 U.S.C. §§ 411(a)(1), 411(a)(2), 412, 481(e), 481(g), 501(a), 501(b) and 529). Plaintiffs' complaint alleged that the present District 50 leadership had taken actions constituting reprisals against candidates for union offices and their supporters; that the present District 50 President had gerrymandered election districts, thereby breaching his fiduciary duty to the union membership; and that the present District 50 President had used union funds to promote his own candidacy.

The D.C. District Court found that defendants had taken reprisals against certain plaintiffs in violation of their LMRDA Title I free speech rights, but found no adequate evidence to support the complaint's Title IV, V and VI claims of breach of fiduciary duty and misappropriation of union funds. The court found "no basis for granting the plaintiffs either compensatory or punitive damages," but ordered reinstatement of position, rights and benefits of certain demoted officers, and enjoined defendants from further interfering with those plaintiffs. The court also awarded plaintiffs attorneys' fees:

"Both as appropriate statutory relief to the plaintiffs, and because of the indirect benefit to the Union as a whole, the Court will award counsel fees to the plaintiffs, the amount to be determined in subsequent proceedings."

600.13 - *International Union of District 50, United Mine Workers of America v. Bowman Transportation, Inc.*, 421 F. 2d 934 (5th Cir. 1970)

A. No. 28197

B. Counsel for Plaintiff-Appellees: James W. Dorsey
(Atlanta, Ga.)
Counsel for Defendant-Appellants: William M. Pate
(Atlanta, Ga.)

C. Thornberry, Morgan & Carswell, JJ.

D. Summary judgment, per curiam, January 26, 1970

Suit under § 301 of the Taft-Hartley Act, 29 U.S.C. § 185, seeking to enforce an arbitration award. The Northern District of Georgia, Henderson, J., granted enforcement, and Bowman Transportation appealed. The arbitrator had ordered the company to reinstate a discharged employee, with seniority but not back pay. The company had refused to comply with the arbitrator's decision, and the local union sued to enforce. The District Court ordered enforcement of the arbitrator's decision, basing its decision on:

" . . . the unmistakable national policy to encourage arbitration as a device to settle industrial disputes . . . [and] the policy of limiting the judicial role in arbitration matters."

The court awarded costs and attorneys' fees paid plaintiffs.

The Circuit Court affirmed, stating that

" . . . [t]he district court has authority to award attorneys' fees where it determines that a party has without justification refused to abide by the award of an arbitrator."

N.B.: For decisions going the other way, see *International Union of District 50, United Mine Workers of America v. Julian*, 341 F. Supp. 503 (M.D. Pa. 1972); *Local No. 149, International Union, United Automobile, Aircraft & Agricultural Implement Workers of America v. American Brake Shoe Co.*, 298 F.2d 212 (4th Cir. 1962).

600.14 - *Retail Clerks International Association, Local Union No. 201 v. Lane County Independent Grocery Employers Committee*, 81 L.R.R.M. 2671 (D. Ore. 1972)

A. No. 71-739

B. Counsel for Plaintiff: Gerald C. Dobie (Portland, Ore.)
Counsel for Defendant: John J. Haugh (Portland, Ore.)

C. Opinion, Skopil, J., November 1, 1972

The plaintiffs initially sued, under § 301 of the Taft-Hartley Act, to compel the defendant to submit a dispute to arbitration. The District of Oregon then ordered arbitration to proceed, pursuant to a stipulation. The defendant refused to abide by the arbitration award, and plaintiff again went to court under Taft-Hartley to enforce the award, whereafter the defendant mooted plaintiffs' case by complying.

Plaintiff then filed a motion for attorneys' fees for (1) compelling submission of the dispute to arbitration, and (2) seeking compliance with the award. The court, Skopil, J., found that defendants were not totally without justification in refusing to submit the dispute to arbitration, and denied fees for that portion of the case:

"With respect to attorney's fees attributable to the period through the date of the arbitrator's award, the Court is not satisfied that defendants' position was totally without justification. Accordingly, the award of attorney's fees for this part of the litigation is inappropriate."

The court did, however, award \$250 fees for the suit to force compliance.

600.15 - *Cross v. United Mine Workers of America*, 353 F. Supp. 504 (S.D. Ill. 1973)

A. Civil No. 72-2

B. Counsel for Plaintiffs: Edward Tarabilda (Springfield, Ill.)

Counsel for Defendants: Kramer, Dye, Greenwood, Johnson, Rayson & McVeigh (Knoxville, Tenn.)

C. Opinion, Poos, J., January 29, 1973

Class action under § 304 of the Labor Management Reporting & Disclosure Act [LMRDA], 29 U.S.C. § 464, by members of locals under District 12 of the United Mine Workers against the United Mine Workers, seeking to dissolve a trusteeship which the UMW had imposed on District 12. The court granted plaintiffs' motion for summary judgment, finding that the semi-autonomous status of District 12 (whereby union members were not entitled to vote for District 12 officers) made it a trusteeship within the meaning of 29 U.S.C. § 402(h). The court also found that the trusteeship had lasted longer than the statutory maximum of 18 months and was therefore invalid under 29 U.S.C. § 464(c), as it was not necessary under any allowable purpose of 29 U.S.C. § 462.

Defendant was thus: enjoined from continuing the trusteeship over District 12; ordered to conduct an election at its own expense for District 12 officers within four months; and ordered to pay plaintiffs' costs and reasonable attorneys' fees.

- 600.15 -

600.16 - *Food Store Employees Union v. NLRB*, ____ F.2d ____ (D.C. Cir. March 21, 1973)

- A. No. 71-1550
- B. Counsel for petitioner: Mozart G. Ratner (Washington, D.C.)
Counsel for respondent: Robert E. Williams (NLRB)
- C. Bazelon, McGowan & Leventhal, JJ.
- D. Opinion, McGowan, J., March 21, 1973

Petition for review of order of the National Labor Relations Board. The NLRB found the employer, Heck's Discount Store, guilty of unfair labor practices in violation of section 7 of the Labor-Management Relations Act, by engaging in, *inter alia*, unlawful questioning and threatening of employees, polling by nonsecret ballot, and refusal to bargain. The NLRB refused to order the employer to reimburse the union's expenses occasioned by the employer's unfair labor practices. The D.C. Circuit reversed and remanded to the Board to grant attorneys' fees, litigation expenses and organizing costs, finding that the NLRB's refusal to grant these expenses was based largely upon

"the fact that the Act assigns the laboring oar to the General Counsel in the prosecution of an unfair labor practice charge, and that the participation of the charging party is not central to the public purposes of the statute but, rather, incidental to that party's efforts to assure protection of its own private interests. With this statutory framework, said the Board, 'the public interest in allowing the Charging Party to recover the costs of its participation in this litigation does not override the general and well-established principle that litigation expenses are ordinarily not recoverable.'

"There are, it seems to us, obvious difficulties with this approach, certainly in the case of an employer who appears to look upon litigation as a convenient means of delaying -- and thereby perhaps avoiding -- the fatal day of union recognition and collective bargaining."

The court found that the Board was, by refusing to reimburse the union's legal expenses in the instant case, departing from its own rationale in *Tiidee Products, Inc.*, 194 NLRB 198 [No. 600.07, *supra*], wherein the Board ordered reimbursement of legal costs "in order to discourage future frivolous litigation, to effectuate the policies of the Act, and to serve the public interest. . . ."

"Although the Board . . . in this case has nowhere characterized the litigation as frivolous, it has used the language of 'clearly aggravated and pervasive' misconduct; and . . . questioned Heck's good faith because of its 'flagrant repetition

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600.16 (Cont'd)

of conduct previously found unlawful' at other Heck's stores. It would appear that the Board has now recognized that employers who follow a pattern of resisting union organization, and who to that end unduly burden the processes of the Board and the courts, should be obliged, at the very least, to respond in terms of making good the legal expenses to which they have put the charging parties and the Board. We hold that the case before us is an appropriate one for according such relief."

600.17 - *United Steelworkers of America, AFL-CIO v. Butler Manufacturing Co.*,
439 F.2d 1110 (8th Cir. 1971)

A. No. 20516

B. Counsel for Plaintiff-Appellee: James W. Shaffer
(James City, Mo.)
Counsel for Defendant-Appellant: James P. Tierney
(Kansas City, Mo.)

C. Matthes, Clark & Bright, JJ.

D. Opinion, Bright, J., April 2, 1971

Suit alleging breach of contract, in violation of § 301 of the Taft-Hartley Act, 29 U.S.C. § 185(a). The Union and the company had signed collective bargaining contracts in October 1962, which contracts were to expire on October 1, 1965. Also in October 1962, the company provided various insurance benefits for employees, which insurance was to be paid for by the company until November 1, 1965.

The union and the company were unable to reach agreements on new collective bargaining contracts in 1965, and the union therefore went on strike on October 1, 1965, the date of the expiration of the old contracts. Thereafter, the company informed the union that it would have to pay the premiums on the insurance for the month of October or the insurance would lapse. The union sued, stating that the company had agreed to pay the premiums through October 1965, and that the union was therefore due back the premiums which it had paid to keep the insurance in force.

The Western District of Missouri, Collinson, J., found for the union, and granted: "an award of exemplary damages sufficient to cover the plaintiff's actual expenses and attorneys' fees in this proceeding . . . under the remedial purpose of the labor laws."

The Eighth Circuit affirmed:

" . . . We think the facts here justify an award of attorneys' fees. Although the district court characterized this item as 'exemplary damages,' it awarded only an amount sufficient to cover plaintiff's actual expenses. Such an award is justified as compensatory rather than punitive. We think the award of attorneys' fees to the successful party in a suit brought under § 301 of the Labor Management Relations Act constitutes an appropriate item of damages to be awarded by courts in the enforcement of national labor policy." [Citations omitted.]

600.18 - *Gilbert v. Hoisting & Portable Engineers, Local Union No. 701, of the International Union of Operating Engineers*, 384 P.2d 136 (S. Ct. Ore. 1963)(*en banc*)

- A. Counsel for Petitioners: Clifford D. O'Brien (Portland, Ore.)
Counsel for Respondents: Gunther Krause (Portland, Ore.)
- B. McAllister, Rossman, Perry, Sloan, O'Connell, Goodwin & Denecke, JJ.
- C. Opinion, O'Connell, J., July 31, 1963

Union members filed a class action against their union leadership in state court, alleging abuse of democratic processes in conducting the affairs of the union. The state court set up procedures to safeguard the democratic nature of the next union election, and awarded the plaintiffs attorneys' fees of \$8,500. The defendants appealed, and the Oregon Supreme Court, *en banc*, affirmed both the decision on the merits and the award of attorneys' fees: 1

"[W]e are of the opinion that the allowance of attorneys' fees was proper in this case. The authority of a court of equity to award attorneys' fees is not derived solely from the statutes. Equity may under some circumstances as a part of its inherent equitable powers award attorneys' fees. This power is frequently exercised where the plaintiff brings a representative suit on behalf of other members of an organization, as for example where a stockholder brings a derivative suit against a corporation.

". . . [M]ore recent cases have permitted recovery where there was a non-pecuniary benefit to the corporation. . . . The preservation of the democratic process in the functioning of unions is a matter of primary concern, not only to union members but to the public as well. Litigation which results in correcting abuses of this process frequently may not give rise to an ascertainable pecuniary benefit. But the fact that no money or property is involved does not detract from the importance of the litigation. Those members of the union who in good faith seek to preserve the internal democracy of their union should not have to bear the expense of a successful suit."

* * *

Gilbert v. Hoisting & Portable Engineers, Local Union No. 701, of the International Union of Operating Engineers, 390 P.2d 320 (S. Ct. Ore. 1964)(*en banc*)

- A. Counsel above.
- B. Court above.
- C. Opinion, O'Connell, J., March 11, 1964

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600.18 (Cont'd)

Successful respondents in the above action moved in the Supreme Court for an additional award of attorneys' fees for successfully defending the appeal. The Supreme Court awarded an additional \$1,500 for counsel's work on appeal:

"If those who wish to preserve the internal democracy of the union are required to pay out of their own pockets the cost of employing counsel, they are not apt to take legal action to correct the abuse. The elimination of improper practices in union affairs benefits not only the plaintiff who initiates the suit but also inures to the members of the union and the public as well. The cost of employing counsel should not be visited upon the persons who bring the suit and prevail.

"It is highly important to the public as well as to the union membership that those in control of the administration of the union should not be permitted to exercise their power for selfish and nondemocratic purposes. No obstacle should be placed in the path of union members who, acting in good faith, seek the aid of the courts in an effort to correct abuses of power by union officials. An obstacle would be presented to such union members if they could initiate proceedings only at the risk of paying the cost of the legal services upon appeal after prevailing in the lower court. The allowance of attorneys' fees both in the trial court and on appeal will tend to encourage union members to bring into court their complaints of union mismanagement and thus the public interest as well as the interest of the union will be served."

600.19 - *Thomas v. Honeybrook Mines, Inc.*, 428 F.2d 981 (3d Cir. 1970),
rehearing denied, 428 F.2d 988 (3d Cir. 1970)

A. No. 17939

B. Counsel for Appellants: John R. McConnell (Philadelphia, Pa.)
 Counsel for Appellees: Thomas N. O'Neill, Jr.
 (Philadelphia, Pa.)

C. McLaughlin, Freedman & Gibbons, JJ.

D. Opinion, Gibbons, J., May 28, 1970

Suit by attorneys for plaintiff-intervenors in a suit which recovered a fund due anthracite coal miners to recover their attorneys' fees.

Plaintiff-intervenors, members of the Pensioned Anthracite Coal Miners Protest Executive Committee [the Committee], instituted a suit seeking to recover monies due the Anthracite Health and Welfare Fund of the United Mine Workers of America [the Welfare Fund] by virtue of the fact that many mines were delinquent in making payments to the Welfare Fund. Intervenors' suit was dismissed on jurisdictional grounds. Thereafter the Welfare Fund itself filed 37 lawsuits seeking recovery from the delinquent mines. The fund created thereby amounted to over \$7 million. The Committee had intervened in each suit.

Intervenors sought counsel fees from the fund created as a result of the suits, alleging that their actions had forced the Welfare Fund to sue, and had therefore been instrumental in creating the fund. The Middle District of Pennsylvania, Nealon, J., disagreed, stating that it would be speculation to hold that the suits were instituted as a result of the Committee's actions, and that, as a matter of law, even if they had the Committee could not recover its fees.

The third circuit, Gibbons, J., reversed, saying "the equitable rule against saddling the active representative of a class with the entire expense of legal efforts of benefit to all should not be applied in a narrow technical manner." The circuit court initially believed the record showed clearly that the Committee's counsel had performed services justifying an award of fees, but later amended its opinion and remanded to the district court, because it believed that the record had not been fully developed. On remand, the circuit court said, the district court should take "into account not only services rendered during the delinquency lawsuits, but also services rendered in bringing about the changes in the [Welfare] Fund trustees' approach."

* * *

Thomas v. Honeybrook Mines, Inc., ____ F. Supp. ____ (M.D. Pa. April 18, 1973)

A. Nos. 8499, 8757, 9053, 9054, 9055, 9100, 9267, 9431, 9543,
 9702 Civil

B. Counsel for Plaintiff-Intervenors: James S. Palermo (Hazleton, Pa.), William Bruno (Philadelphia, Pa.)
 [Continued]

600.19 (Cont'd)

C. Opinion, Nealon, J., April 18, 1973

On remand from the above, the Middle District of Pennsylvania, Nealon, J., awarded plaintiff-intervenors' counsel a total of \$109,500 attorneys' fees and \$3,076.61 expenses.

The district court ruled that the third circuit's opinion required him to award attorneys' fees if the Committee's actions had "helped" to create the fund; and that it was not necessary for the Committee's actions to have "forced" the Welfare Fund to sue and produce the fund. He then ruled that the actions of the Committee had *not* forced the trustees to sue:

"[T]he influence of the Committee or its counsel . . . was not of such magnitude and import to force, in itself, the decision of the trustees to sue Honeybrook at that time.

"The resistance slowly softened, in my opinion, by a combination of factors including the activities of the Committee and its counsel"

* * *

"I conclude that the efforts of the Committee and its counsel were a substantial contributing factor to the institution of the legal actions which produced the fund previously referred to. Believing that this is the criterion mandated by the Court of Appeals, I find that the Committee is entitled to recover counsel fees and costs. I must point out, at the same time, that I feel other factors also motivated the trustees' decision to resort to court action and if the Committee had to establish that the trustees' suits would not have been brought *but for* their activities, I would have found against the Committee. I specifically refuse to find that without the Committee's activities the lawsuits *never* would have been started and the delinquencies *never* recovered."

Turning to the problem of the amounts to be awarded, the district court stated that

"[c]ounsel for the Committee merely monitored the actions against the delinquent operators and played no real part except to sit in on conferences and to approve settlements. Consequently, the great bulk of their work was in the litigation against the Union and in their attempts to obtain information from the trustees and to stimulate them into action."

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600.19 (Cont'd)

The records indicated that one junior attorney had "expended a minimum of 2,000 hours" on the case, and that another, older and more experienced counsel, had spent at least 1,500 hours on the case. The junior counsel,

"in view of his ability and experience and considering the locality in which he practiced, seeks payment of \$35 to \$50 per hour while [the more experienced attorney], because of his greater experience and his metropolitan area practice, requests \$75 to \$100 per hour which, according to the evidence, was the prevailing rate in Philadelphia."

The court, however, awarded the junior counsel fees of \$21 per hour, and the senior counsel fees of \$45 per hour,

"considering the time spent by counsel for the Committee, most of which was out of court and in a consultative and investigative capacity; the fact that the Fund has also paid counsel fees to its lawyers who actively prepared and proceeded with the litigation against the operators; the fact that the fund was not created solely by their efforts; the fact that some of the time expended by Committee counsel was in a monitoring capacity and not as active counsel in the royalty lawsuits; the benefit conferred by their services; and the amount recovered . . ."

600.20 - *United States Steel Corporation v. United Mine Workers of America*,
79 L.R.R.M. 2518 (3d Cir. 1972)

A. Nos. 19454-81

B. Counsel for Appellants: Lloyd F. Engle (Pittsburgh,
Pa.)
Counsel for Appellees: Leonard L. Scheinholtz (Pitts-
burg, Pa.)

C. Seitz, Kalodner, & Gibbons, JJ.

D. Opinion, Gibbons, J., February 3, 1972

Appellees (four steel companies) filed suit against appellants (union and individual union members), alleging that work stoppages should be enjoined pending arbitration under § 301 of the Taft-Hartley Act, 29 U.S.C. § 185. The Western District of Pennsylvania issued preliminary injunctions in all cases on June 24, 1970. Six days later, on June 30, 1970, the third circuit summarily reversed on procedural grounds. A hearing *de novo* was set before the district court, but the parties reached a tentative agreement, the work stoppage ceased, and the parties stipulated that the suit be continued indefinitely, prior to the hearing. At this point the suit was ended "for all practical purposes." 79 L.R.R.M. at 2520.

One month later, attorneys for the union and its members moved for an award of attorneys' fees and expenses under § 7 of the Norris-LaGuardia Act, 29 U.S.C. § 107 (*see* Appendix A), which calls for an award of attorneys' fees and costs incurred as a result of "the improvident or erroneous issuance of . . . [an] injunction." 29 U.S.C. § 107. At a hearing on the motion, parties stipulated that expenses of \$730.94 had been incurred, and reasonable attorneys' fees for work in the district and circuit courts were \$10,620 (a total of \$11,350.94).

The district court, Gourley, J., denied the motion for attorneys' fees, 317 F. Supp. 1070 (W.D. Pa. 1970), reasoning that: (1) because the third circuit, in its June 30 summary reversal, had stated that each side should bear its own costs, the district court was barred from awarding attorneys' fees; (2) the third circuit had reversed on procedural grounds, and there was therefore no decision on the merits on which to base an award; and (3) the case had been continued, not concluded, so a motion for attorneys' fees was premature. The motion was denied, "without prejudice to [defendants'] right to re-submit similar motions should the outcome of the proceedings warrant the same."

Appellants noted this appeal. Appellees moved to dismiss the appeal, stating that, although the order appealed from was interlocutory in form, it was in fact final, because no further district court proceedings would be held. The third circuit subsequently sat to consider whether the district court had erred in refusing to award attorneys' fees.

The court held, first, that, although the suit was brought under § 301 of the Taft-Hartley Act, an award of fees under § 7 of the Norris-LaGuardia Act was not precluded: "no necessary accommodation between the policies of Norris-LaGuardia

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600.20 (Cont'd)

and of the Labor-Management Relations Act requires that the union be deprived of the award of counsel fees under § 7." It held, secondly, that although application of § 7 in a § 301 case may "creat[c] a conflict between labor law in the state courts and labor law in the federal courts . . . that is what Congress intended when Norris-LaGuardia was passed and § 301 of the Labor-Management Relations Act suggests an accommodation, not a repeal." The court therefore found that § 7 of Norris-LaGuardia "applies in the federal courts even when the injunction is sought pursuant to § 301."

The court of appeals also rejected the argument that the language and amount of the injunction bond precluded or limited the fee award, and concluded:

"We hold, then, that in any case involving a labor dispute the liability of the plaintiff, though not of any surety, for loss, expense or damage, including attorneys' fees, under § 7 of the Norris-LaGuardia Act shall be fixed by the court without regard to any limitation in an injunction bond."

The third circuit thus reversed and remanded with instructions that stipulated amounts be awarded as counsel fees and expenses.

Senator TUNNEY. I think it is fair to say all four members of the panel would like to see the abrogation of 28 U.S.C. 2412; is that correct.

Mr. DERFNER. Yes.

Mr. BAMBERGER. Yes.

Mr. ONEK. Yes, sir.

Senator TUNNEY. Earlier on I made the suggestion and comment that as a general rule it is a policy that Federal taxpayers' dollars will not be used to support one side or the other in litigation between two persons, be those persons individual citizens or corporations. I think that is a public policy goal.

Mr. Onek suggested that because we do allow indirectly a tax benefit to corporations in a sense that what we have done as a national policy is to vitiate that goal, if in fact it is a goal.

Now, I personally think that the goal is extant. I do not think we live up to the goal, however. I think that all of you have suggested that this is in fact the case, because we do give substantial tax benefits to corporations that private individuals who are pursuing public interest lawsuits do not enjoy.

I wonder how, assuming for the moment that it would be impossible to abrogate 28 U.S.C. 2412 in its entirety, it is possible to encourage private individuals to bring public interest lawsuits and still pay attorneys not at the end of the case but during the litigation.

We have heard Mr. Flannery suggest that in a difficult case it cost tens of thousands of dollars to be able to conduct the case including being able to get expert witnesses.

How can we in some way find a means of financing those public interest lawsuits during the course of the litigation without opening up the Federal Treasury to a raid by frivolous type suits? Should it be a judgment of the court at the beginning of the suit that in fact this suit does represent a legitimate public interest and, therefore provide a certain amount of attorneys fees, a certain amount of money for expert witnesses as the litigation is pursued?

I don't know what the answer is and I must say that I have not thought about the matter nearly as deeply as any of the witnesses that have testified this morning. I suppose that was the purpose of the hearings, to benefit from expert testimony.

Are there any suggestions that any of you may have.

Mr. BAMBERGER. Can I suggest as an analogy again—the contingency fee case. If there is an established fund from which the attorney's fee can be paid at the conclusion of the case, I would think that there would be foundations, public bodies, that would be willing to put together a fund that would sustain the costs eventually recouped out of those cases. I suspect that also there would be many cases in which the attorney himself is able to cover the costs. I am not talking about the kind of cases Mr. Flannery talked about, 2 years of expenses, what might be hundreds of thousands of dollars and at least tens of thousands of dollars, but again you see the bar responded to that and the bar allows an attorney in a contingent fee case to advance funds under some restrictions to support the case although that is a common law crime. If you know there is recovery at the end I suspect you can get the interim funds.

You said in your question how do you prevent the bringing of the frivolous suit. You do need some control on that. There is one example I think about there and that is the scheme like the British Legal Aid and Advice Act where there is a kind of screening process before one is eligible for legal assistance under that act but also a system that again like the contingency fee case where the lawyer would have to know he has a reasonable prospect of not only recovering the judgment but also recovering fees before he or the client take the gamble of advancing the costs. That is a kind of deterrent.

Senator TUNNEY. I had the opportunity about a week ago to speak to two British parliamentarians in my office who were very interested in the whole question of providing legal services to citizens. They told me there is very strong pressure in Parliament to substantially reduce the quality and quantity of legal services provided to British citizens. It just cost too much. Within the conservative party it appears that during the next year or so there is going to be a strong move, to reduce the quality and quantity of legal services. So it is not a unique American problem. The taxpayers in other parts of the world as well object to seeing private rights pursued with the use of taxpayers dollars.

I still believe that the people of our country do not feel that Federal tax dollars ought to be used in the litigation to benefit one side or the other. I don't think they are aware, as it has been suggested, of the amount of money which indirectly is given to corporate defendants in some of these public policy cases.

Mr. BAMBERGER. I think it might be a helpful contribution sometimes to catalog those.

Let me recall a kind of example Mr. Onek did mention.

When I was in my last year in private practice I represented a bank that wanted to merge with another bank, it was a national bank, the Comptroller of the Currency gave us permission to merge. The Department of Justice decided that the proposed merger violated the Antitrust Act and brought suit to stop it.

When I sat down at the trial table representing the bank, the general counsel for the Comptroller of the Currency sat next to me and was of great help to me, gave me a great deal of help on research, and sitting over there was the attorney from the Department of Justice. I sat between the two Federal attorneys. I never heard anybody complain about the Comptroller of the Currency's attorney helping the bank but I suspect if I was sitting there with a welfare mother and was being paid from Federal funds that there would be a complaint.

I would like to think that your experience is an aberration of California and the result of some of the work of one of your predecessors in the Senate from that State who had so much to say about that. I would like to think he is wrong.

Senator TUNNEY. I think he is wrong about the philosophy, I am not so sure he is wrong about the politics.

Mr. BAMBERGER. Perception of politics.

Mr. Onek mentioned one other thing. We have to think more about providing legal services for the people above the line of stark poverty and there is, as you certainly know, a great move in the country

to do that now. It did not initiate really with either the Congress or State legislature or the bar, it began with the consumers, the move for prepayment plans, and some of the feeling that you perceive and that I perceive, too, may be a reflection of the fact, "Damn it, because they are poor they have a lawyer. I have a few fights I would like to carry to the court too." Maybe if we begin to meet some of this need it may not be felt so strongly.

Senator TUNNEY. I hope you are right. I would like to think that you are right. I would like to think that people are not totally selfish. I would like to believe that people don't reason like this: I am having problems getting into court, therefore, I am opposed to any kind of Federal program which enables the very poor to get into court. I don't know. I do feel very strongly, as I suggested at the very beginning of these hearings a couple of weeks ago, that we have to try and be responsive in this Subcommittee not just to the very poor and their problems. While their problems are real enough, the middle-income wage earner who is denied access to the courts or access to the service of the lawyer because he can't afford it has real problems too. He has programed his budget to the point that any payment of attorney fees represents a diminish of his standard of living and giving back an appliance, giving back his car perhaps, even having to move out of his house. We must be responsible to his or her interest as well.

Mr. BAMBERGER. Let me suggest another example. If a city or a State enacts legislation to issue bonds, counsel for the underwriters look at it and say we have got some questions about it. How are those questions resolved. A taxpayer's suit is instituted at the public expense. Now, you can argue that is for a public good cause because it is to issue public bonds. So I think many of the areas of litigation we are talking about are for public good but essentially that question was raised because the underwriters were not willing to buy the bonds without a court opinion, and then the State will subsidize the lawsuit.

Mr. DERFNER. I think another suggestion would also provide some food for thought and that is the idea of a revolving fund. What is needed in these cases, in addition to some assurance of fees in general, is something to solve the cash flow problem, to enable the lawyer to hire experts or take depositions and get transcripts while the case is going on. If the overall reform comes through, he will often get those expenses back in the end from the other party. But, No. 1, he still needs the resources at the beginning; No. 2, he needs some protection against having to repay those expenses if his case, though meritorious, is unsuccessful. I don't think it would be unreasonable for the Federal Government to create a fund for such advances of expenses, with the idea that in most cases what was paid out of it would come back from the losing party. That is what courts do in some cases now. That is what the Supreme Court does. When I have an indigent client in the Supreme Court, the Supreme Court does not tell me to type my brief and skimp, they send my brief and appendix to their printer, they print it on their printing press. If I lose, then they absorb it. If I win they collect it from the other side. As I say, it would not be at all unreasonable or unprecedented for the Government to put a provision like that.

Of course, if attorneys' fee awards became more common so that lawyers foundations and other sources of funds were relieved of the heavy obligations that they have now of paying for everything, without prospect of getting it paid, perhaps these private sources would be able to set up such a revolving fund or otherwise help with the task of advancing heavy expenses.

Mr. ONEK. I have talked to foundation officials about this idea and in fact they have suggested it to us. The only problem at the present time is that I had to assure them there was no way the fund could ever revolve. There are not enough ways at the present time to get funds paid back. I think Armand is right, the foundations would be very interested. I also think the Federal Government might do what it has done in other areas, use subsidized interest payments to encourage the private market—banks—to set up the fund. Lawyers on their own might then be able to negotiate these loans. As Dean Bamberger said, obviously the personal injury field lawyers have figured out a way to manage. I assume they get bank loans to open their offices. So, maybe all that would be needed in less lucrative fields of law would be a subsidy of the interest rate that the banks charge.

Senator TUNNEY. Can each of you tell the Subcommittee briefly how your organization or the group of attorneys your organization represent is funded? What amount of time and effort goes into insuring additional or continuing funding?

Mr. ONEK. Our group is funded almost entirely by foundations, the Ford Foundation, the Rockefeller Brothers Fund, the Clark Foundation and some smaller foundations. I think these foundations are particularly good in trying not to interfere with your day-to-day work by making you fill out many papers and forms. But nevertheless it does take time first to locate a foundation that may be interested in giving you money, then getting a grant, and they renewing it. I am spending all day tomorrow up in New York seeing what I can do to make sure we are renewed. A problem is that if you only get 1-year or 2-year renewals it makes it difficult to plan ahead, to promise lawyers you can hire them for an extended period of time and take on cases you know may take 2 or 3 years.

Senator TUNNEY. What percentage of your time or of attorneys with your organization is taken up with this funding problem?

Mr. ONEK. At the center, only 3 of the 12 attorneys do fund raising, and I suppose it takes up anywhere between 10 and 25 percent of their time.

Senator TUNNEY. Dean?

Mr. BAMBERGER. We are funded poorly in the first place. individual contributions, mostly attorneys, corporate contributions, membership dues from legal aid societies and defender organizations, and some foundation support. We have some specific contracts and grants. We are doing a study for LEAA and technical assistance for OEO. My guess would be about 20 percent of the total staff time, not all lawyers, because we are not principally a litigating or lawyering organization, but I would say that at a minimum 20 percent of professional staff time is spent on fund raising, and a good deal of board time.

Mr. DERFNER. The lawyer's committee is funded principally in two ways. The general operations, overhead and so forth, are largely funded by contributions from lawyers and firms. Specific projects and activities of specialists in particular areas of the law are generally funded by foundations or in a couple of cases by Government contracts. I would say Dean Bamberger's estimate of about 20 percent is right for us. It includes full time of at least four people and some substantial amount of time for others. I would like to add one other thing on that, it is not just the time that bothers me, the reason I hate to do fund raising from foundations is the knowledge that I am in effect asking a foundation to give money to our cause rather than to somebody else who needs it just as much as we do and whose work is certainly on a par and as important in the national interest as ours.

Senator TUNNEY. I would like to ask another question to all three of you. Will fee-shifting enable you to litigate in new areas and could you just perhaps identify the major areas which fee-shifting would help you move into?

Mr. ONEK. Well, at the moment we are in the areas of environmental protection, consumer protection, rights of the mentally ill and of patients generally. Since we are well supported by a variety of foundations we are free to litigate in whatever area we wish, with the limitations that Mr. Flannery pointed out. We can only handle at most one big case at a time. Obviously if we thought there was a chance for recovering fees in big cases we might be able to handle more than one. At the moment when a case comes before us we have to ask ourselves "is this another pipeline case"? If it is that means we can't take it. A pipeline case takes so much time it is not possible for a firm of our size to handle two of those cases at once. If there was some real possibility of a payoff at the end we could handle it. I think that the big case problem is terribly important when you talk about possible contributions by private lawyers. The private lawyers are unlikely ever to handle the big cases. A lawyer in a private law firm may take a small case on a pro bono basis and do a tremendous job and the firm won't mind. But it is very unlikely the firm is going to be willing to take on a big case.

Mr. BAMBERGER. Our constituents, the legal aid societies and defender organizations, are responsive to the grievances of their clients. The National Legal Aid and Defender Association itself does also have a law office called the National Law Office supported entirely by foundation funds which engages principally in litigation on behalf of prisoners and also in the area of the rights of mentally retarded children.

Mr. DERFNER. There is no question that the availability of fees will make a difference.

First of all, the work we can do now almost has to be in an area where a foundation has decided that something interests them, voting discrimination for a year or two or health problems for a year or two, or what have you. The availability of fees would free us from that problem. Fully half our staff works on problems of employment discrimination and the only reason we can devote such a disproportionate amount of time and effort to that is that those efforts can

become almost self-supporting because Congress has provided that fees be shifted in title VII cases. I would like to add one thing. The quality of lawyers in a field can be greatly affected by fee shifting. The availability of fees under title VII, for example, has led to the development of a highly skilled group of specialist lawyers who have moved that law far from where it was when the statute was passed.

Second, a lot of our efforts are devoted to getting other people involved in *pro bono* activities. For example, the lawyers committee has a program called the one percent program in which we try to get a number of lawyers and firms to devote 1 percent of their billable time for a given year to *pro bono* cases. If the fees were available not only would those firms see that they were not about to lose substantial amounts of money but we would have more staff people to work with those firms, both lawyers and other supporting personnel. There would be far fewer limits to the kinds of activities that we would engage in to make our work most effective.

Senator TUNNEY. The National Institute for Consumer Justice Report released on September 28, 1973, recommends that successful plaintiffs should get fees as a matter of course unless the court feels that the plaintiffs' lawyer is engaged in unfair or unethical activities. It also recommends that the defendant be awarded fees only where a plaintiff's case was frivolous, and I would assume all of you would concur with that recommendation and perhaps even go a little bit farther.

Mr. DERFNER. I would go farther and I think Congress has gone farther. Congress has passed three or four statutes that provide specifically for defendants to get fees in commercial areas, mostly where the plaintiff has brought frivolous cases, and there are a few other statutes in which Congress has said the prevailing party gets fees, but by far the vast majority of the statutes Congress has passed providing for fee-shifting say specifically if you bring a suit under the statute and you win you get fees. In other words, there is no provision for defendants to recover fees in most of the statutes Congress has passed.

Senator TUNNEY. Well, I want to thank all of you for—

Mr. BAMBERGER. Could I add one thing which may write me out of the legal profession? I do not believe that it is the responsibility of the medical profession to provide medical care for those who can't afford it and I don't believe it is the responsibility of the profession to provide legal assistance for those who cannot afford it, but I do think that the bar may have a higher responsibility than other citizens. We say we have it in our code of professional responsibility. We at the bar do receive a public subsidy. We and our clients are subsidized by the clerks and the judges and the courthouses that are supplied with public funds.

There are some examples of bar associations which have by one form or another assessed lawyers to support public interest law firms. I think that ought to be encouraged. I think you should even consider the possibility of a kind of public assessment.

I am the senior here, I guess I can go back in old history. Some years ago when I first came to the bar I learned about the "flower fund." In every case that was litigated in the courts in Baltimore,

there was an appearance fee. When the case was concluded the lawyer received a notice that he should come to the clerk and get his appearance fee. It was a \$5 fee that was part of the cost assessed against the losing party. The winner got \$5. But when you went to get it you signed a receipt for \$5 and you received \$4.50 and it went to what I was told was the "flower fund." When people in the clerk's office got sick they sent them flowers. They could buy a hell of a lot of flowers. It would also provide a good deal of legal services if there was a kind of assessment which really is not directly an assessment on the litigating lawyer but is an assessment on the party who can afford to litigate. Is a kind of repayment by him of the subsidy that the state gives him in supplying him with the judicial machinery and the judicial building and he helps to pay for that subsidy and that money is used to provide the advocacy that other people can't buy in order to use the public facility for which they contribute also.

That is the rationalization to justify it.

Senator TUNNEY. I want to thank all of you for the testimony that you have given today. I personally have found it very enlightening. Unfortunately I have not had the opportunity in the past to get into the subject in the depth that I would like. Because I perceived it as a significant problem, I am hopeful that as a result of these hearings we will be able to develop some meaningful legislation that will give greater redress of grievance to our citizens and at the same time get through the Congress. I don't want to be a party to frivolous legislation that dies in Subcommittee.

But I think that this has been a most interesting discussion not only from the point of view of the witnesses at the table now, but the previous witnesses. I want to thank you all for spending the time in preparing your testimony.

The hearings will continue tomorrow at 9:30, here, on this same subject.

[Whereupon, at 12:40 p.m., the Subcommittee recessed to reconvene at 9:35 a.m., Friday, October 5, 1973.]

LEGAL FEES

FRIDAY, OCTOBER 5, 1973

U.S. SENATE,
SUBCOMMITTEE ON REPRESENTATION OF CITIZEN INTERESTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Subcommittee met, pursuant to notice, at 9:35 a.m., in room 2228, Dirksen Senate Office Building, Senator V. Tunney (chairman) presiding.

Present: Senator Tunney (presiding).

Also present: Jane Frank, chief counsel; Neil Levy, assistant counsel; Joseph Dawhare, minority counsel; Ann Hennigan, chief clerk; and Matthew Schneider, staff assistant.

Senator TUNNEY. Today we continue our investigation of the subject of legal fees and its effect on the availability representation to previously unrepresented segments of the public, as well as its effect on the business interests and others.

Yesterday we heard extensive testimony from attorneys on behalf of a wide variety of plaintiffs—Mexican-Americans displaced by the construction of a highway, Indians, environmentalists, people deprived of their rights to equal protection; poor people and the mentally ill.

One common threat existed in the cases of all of these plaintiffs: before the advent of the public interest or government subsidized attorney, they had no way to get legal representation to vindicate their rights. At the same time, one common thread existed among all of the attorneys; they were able to afford to take these cases only because the Government or some private foundation or other private party made funds available to them, or the courts had awarded them fees to be paid by the defendant who had lost in the suit they brought.

Today we hear from business interests and others about the additional effects of fee-shifting and about the problems involved in determining the amount of fees to be awarded once the principle is established.

Our first witness today is Richard Godown, general counsel, National Association of Manufacturers, Washington, D.C.

Welcome. We appreciate your being with us, Mr. Godown. I want to thank you for accepting our invitation on relatively short notice.

STATEMENT OF RICHARD GODOWN, GENERAL COUNSEL, NATIONAL ASSOCIATION OF MANUFACTURERS, WASHINGTON, D.C., ACCOMPANIED BY SIMON TUCKER

Mr. Godown. The National Association of Manufacturers, with member companies of all sizes, in all sections of the country, and from all sectors of American industry, is pleased to have the oppor-

tunity to comment on the question of court awards of attorneys' fees to the prevailing party in litigation. Any approach to provide, in some general way, for court awards of attorneys' fees is bound to have a particular impact on industrial and business concerns. Hence, the question before the Subcommittee here is of more than passing interest to this association.

Senator Tunney's letter of September 24 inviting testimony by NAM indicates that the question of "court awards of attorneys' fees to the prevailing party in litigation" should be considered from the point of view of how this "development bears on the ability of citizens to obtain adequate legal representation." On the broader problem of adequate legal representation, it is common to make various references to the dire difficulties faced by many people. I want to point out, preliminarily, that these difficult problems are not related to the question of awarding attorneys' fees to the prevailing party in litigation.

For example, references are made to "people not being able to get legal questions resolved"; to this unsatisfied "legal right to redress of grievances and injustices"; to extending "consumer protection to the legal area"; and the like. These all tend to cast the plaintiff in litigation in a sympathy-commanding light, as an underprivileged, aggrieved, imposed-upon party. Of necessity, by contrast, they tend to cast a pejorative reflection upon the defendant in litigation. Industrial and business concerns tend to be the defendants as against the "socially-aggrieved" type of plaintiff. Hence, I hasten to point out that this comparison of a good plaintiff as against a bad defendant is not really what's involved in the question of making some general provision for awarding attorneys' fees to the prevailing party in litigation. What's involved in a litigation situation is a presumably good-faith assertion by a plaintiff that a defendant has violated his rights; and a presumably equally good-faith assertion by the defendant that he did no such thing—that he violated no duty owed to the plaintiff.

Both plaintiff and defendant are—or should be—equal in the eyes of the law; both should stand on an equal footing before the courts. Let me quote, in this connection, what the judge said when he awarded attorneys' fees to the plaintiffs in the case of *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972) :

We cannot emphasize enough that in granting this motion, the purpose is not to saddle the losing party with the financial burden in order to punish him, rather we shift the financial burden in order to effectuate a strong congressional policy. [At p. 102.]

So, in the words of Mae West: "Goodness had nothing to do with it"; nor did badness.

Incidentally, *La Raza Unida*¹ is the decision which has spawned a spate of current discussions on the question now before this Subcommittee. I shall refer to it hereafter as simply *La Raza*. I should take the opportunity at this point to note for you that, while this testimony was framed, or at least "finalized," after a quick reading of the current law review and other material on court awards of attorneys'

¹ Set forth in full at p. 1326.

fees, time available after receiving the Subcommittee's call did not permit the kind of careful, slowly-simmered preparation of the Association's comments which we like to engage in.

Mr. Tucker and I were discussing on the way up, the possibility of a law review article along the lines of inquiry we are directing ourselves to this morning and indeed, if the gods are kind to us and we find time, we will be most pleased to submit that for the record.

Senator TUNNEY. Yes, We appreciate that. Our record will be closed 30 days after this hearing, which will mean November 6.

So if you have a draft of it before then, we would appreciate having it. If not, we will just have to wait until we hold new hearings.

Mr. GODOWN. We will do our level best, Senator.

Senator TUNNEY. Thank you.

Mr. GODOWN. Within the general context of peoples' representational needs and deficiencies, there is a tendency to make reference to citizens' difficulties with bureaucracy, and to deprivations of constitutional rights of persons. I would note that such references apply to governmental actions—of commission and of omission—not to the litigation relationship between private parties. In our view, the solution to problems in this governmental connection lies in use of the ombudsman, in application of proper administrative due process, and the like. As will be mentioned further below, *La Raza* was an action by private citizens against governmental units, that is, the Federal Government is presently immune from award of any kind of court "costs" against it, as the legal literature points out. At any rate, the judge's opinion in *La Raza* makes this interesting statement:

Responsible representatives of the public should be encouraged to sue, particularly where governmental entities are involved as defendants. As the amicus brief points out, only private citizens can be expected to "guard the guardians," [At pp. 100-101]

The notions of "responsible representatives of the public" and of encouraging suits, in the first sentence above, seems to apply more against governmental defendants than against private defendants. The point is further made in the opinion that, often, governmental units would not be available to bring suit because those units would be the defendants in the suit. All of this points out that the real problems which generate consideration of awards of attorneys' fees have to do with the citizen's relationship to his government; not so much with the litigational relationship between private parties. In this citizen-government context, I would like to suggest in passing, remedies for problems connected with bringing litigation may better lie in devices other than awarding attorneys' fees to the successful plaintiff.

In the background of discussions of representational difficulties encountered by people, it is common to lay stress on difficulties faced by people in securing adequate legal help at fees that are not too high. Respectfully, I would like to suggest a point of logic here. If an attorney requires a retainer, he will not take the case on a contingent basis, his fee to come to him only if the suit is successful; if an attorney works on a contingent basis, what he usually has in mind is a percentage of a damages award, not an award of attorneys'

fees by a judge. How, then, would provision for awarding attorneys' fees to the successful litigant enhance the availability of attorneys or lower their fees?

Let me now deliver an overall judgment against an approach that would make some kind of general provision for award of attorneys' fees to the successful party in litigation. What I particularly want to stress at this point is how extreme a departure such an approach would be from prevailing and modern-day practice in courtroom litigation, even as updated by the *La Raza* ruling. *La Raza* pulls the up-to-today thinking on this matter together. The judge points out there that there are three different bases which have been used for awarding attorneys' fees.

Perhaps the most common, relatively speaking, is the "obdurate defendant" situation; where the defendant engages in obdurately bad faith behavior. Here, the judge's award of attorneys' fees to the plaintiff—providing he prevails—is punitive. It is as though the judge is awarding a measure of punitive damages to the prevailing plaintiff. Perhaps a more relevant way of looking at it is as though the judge is making a damages award to the plaintiff for malicious abuse of process by the defendant. We know, of course, that malicious abuse of process is generally thought of in connection with plaintiffs bringing improvident suits. However, where a defendant knows, or should know, that he is at fault, but nevertheless forces the plaintiff to go to court, it can be rationally said that the defendant is guilty of abuse of judicial process by calling it into play when he should have known better. In any event, the "obdurate defendant" approach does not need any new provision for awards of attorneys' fees to the prevailing party—plaintiff, that is—in a litigation; for the courts already exercise this power. What might be considered, to turn the situation around, is whether courts shouldn't award attorneys' fees to successful defendants as part of the award of costs at the end of a suit; without requiring the defendant to institute a separate suit for malicious abuse of process.

The second basis that has been used by courts for awarding attorneys' fees is the "common fund theory." In this, the court forces the various beneficiaries of a plaintiff's successful suit to share the attorneys' fees sustained by the plaintiff, awarding such fees out of a "common fund" if any resulted from the litigation. This approach has been particularly used in stockholder derivative suits, where, it might be noticed, the total mass of plaintiffs and beneficiaries—that is, the total body of stockholders—really equals the defendant, which is the corporation as a whole. In any event, the "common fund" approach does not involve awards of attorneys' fees against defendants. I, therefore, suggest that it is not really relevant to the subject under discussion here.

The third basis for present-day court awards of attorneys' fees is on the theory that the successful plaintiff has served the community as a "private attorney general," presumably accomplishing things that the real attorney general should have tackled. For application of this approach, there must be a widespread effect in benefiting many persons; there must be a substantial effect in effectuating strong or important governmental—that is to say, congressional—

policy; and there must be a need for a private party to bring the action, since no governmental party is available to do so. The third factor above fairly suggests that the defendant in such a situation must be a governmental unit, since it is in that situation that a government unit will not be available to sue itself. As pointed out by a quotation from *La Raza* previously, the judge in that case also fairly suggested that court awards of attorneys' fees on the "private attorney general" basis were relevant only where governmental units were the defendants.

By contrast—and very sharp contrast, at that—provision on some general basis for awards of attorneys' fees would project such awards a very extreme distance beyond current practice. Moreover, such awards would have an extremely punitive effect as against private nongovernmental defendants, including industrial and business defendants. Against such defendants, they would carry the award against the obdurate defendant over into situations where there was no bad faith on the part of a defendant, and where the defendant has not maliciously called into play the judicial process by, in effect, saying to the righteous plaintiff: "Sue me! I know I'm wrong; but I'm not making you whole unless and until you go to court and get a court to tell me so." As pointed out previously by a quotation from *La Raza*, the judge in that case stated that he "cannot emphasize enough" that his award of attorneys' fees had for its "purpose . . . not to saddle the losing party with the financial burden in order to punish himself"; but rather to "shift the financial burden in order to effectuate a strong congressional policy." In the context of these words, it is not believable that the court would have awarded attorneys' fees against a private nongovernmental defendant. The opinion in the *La Raza* decision clearly reveals that what the court did was to make an appropriation of governmental funds to pay attorneys' fees for a plaintiff who had accomplished a public purpose that the government should have carried out on behalf of a large body of public beneficiaries. It is inconceivable, from the tenor of *La Raza*, that the court would have made such an award against a private good-faith defendant not possessed of the responsibility to execute public governmental functions. In the light of this, it is fair to say that a provision on some general basis for court awards of attorneys' fees would be a very extreme measure, of highly punitive effect—and therefore a very bad piece of social policy to engage upon.

Moreover, the idea of providing on some general basis, rather than in terms of specifically circumscribed circumstances, for awards of attorneys' fees to prevailing litigants immediately raises operational problems. For one thing, which cases will it apply to? Will it apply to all cases, or only to a class of cases denominated as public interest cases? If the latter, who will determine which is a public interest case; and by what standards will this determination be made? Will the trial judge's discretion be brought into play; and is the trial judge's discretion adequate for a determination which is not really a judicial process matter? Will both parties, plaintiff and defendant, be eligible for award of attorneys' fees if successful in suit or in defense? If so, will anything have been accomplished? Fur-

thermore, the business defendant will often not be able to recover such an award from a financially thin or indigent plaintiff; hence, there would be need for a system of posting bond to assure payment of attorneys' fees by an unsuccessful plaintiff. This would deter litigation rather than encourage meritorious litigation. If only the plaintiff would be eligible for award of attorneys' fees, as is strongly suggested in the past history and the current discussion of this matter, there would clearly be some problems of unconstitutional discrimination in the offing—problems that are not involved if awards are made on specific justified bases, such as the obdurate defendant basis. If the judge is allowed to decide in his discretion, what standards could be spelled out, other than the legally irrational one of whether one party or the other seems to be the good guy or the bad guy.

There are various specific difficulties with a proposal, on some general basis, for court awards of attorneys' fees to the party prevailing in litigation. I will quickly mention, in summary form, the main ones:

1. As has been indicated, this remedy is not directed at the problem to be solved; namely: The lack of availability of adequate legal counsel services at reasonable fees. It is an after-the-fact remedy—after a party has surmounted the hurdle of securing adequate legal representation; and provides no remedy for the party's problem of securing adequate legal representation before the case even begins.

2. It is an erratic device because it arbitrarily rewards the plaintiff who wins. In many cases, the plaintiff who wins is not a meritorious plaintiff; and, in many cases, the plaintiff who is meritorious does not win. Winning or losing a suit brought by a plaintiff depends on many factors, many of them arbitrary and accidental, such as availability of evidence. Among them is the factor of which plaintiff can afford the better legal representation in the first place.

3. As far as the defendants who might be taxed with such costs are concerned, the burden falls unequally. A suit by a party is likely to be as large against a small defendant without much financial resources as against a large defendant with substantial financial resources. But, the large defendant can bear the burden of an award of attorneys' fees more easily than the small defendant, who may be decimated by such an award.

4. It is argued that the lone individual needs some help as against the powerful business entity, in many cases. What is forgotten is that the powerful business entity must face possible attacks from many, many individuals. The larger the business entity, the greater the numerical potential for multitudinous suits against it.

5. Providing for awards of attorneys' fees will tend to increase greatly the fees secured by attorneys from litigants. It will therefore not redound to the benefit of the plaintiff-litigants, so much as that of the attorneys. Moreover, such an approach will be likely to result in padding the fee-costs of suits.

6. Other mechanisms are available that can more reasonably and rationally accomplish the objectives desired, in place of awards of attorneys' fees, such as:

- a. Public interest law firms.
- b. Legal aid and legal assistance.
- c. Bar association referral systems.
- d. Use of law students effectively.
- e. Use of para-legal help to cut the costs of attorney services—with development of effective systems for training para-legal personnel.
- f. Public interest contributions of time by established lawyers—with time off from having to serve as public defenders in criminal trials.
- g. Use of already-existing regulatory programs and Government agencies.
- h. Provisions for better access to small claims courts by increasing the number of such courts and increasing the dollar size of the cases they can handle.

7. Business firms already bear unduly heavy burdens incident to so-called “public interest” suits, such as class actions (in many cases where no proper legal basis exists for such class action), and loose improper litigation, such as where standing to sue does not really exist. Even where a suit is groundless there are nevertheless heavy legal fees in defending against such.

I would add this point, Senator Tunney. We feel that not every dispute should be litigated nor require a lawyer going to court. In fact, going to court ought to be a last resort.

For the various reasons reflected in the above commentary, this association would strongly urge that alternative approaches to meeting the legal representation needs of American people be sought and looked to.

Senator TUNNEY. Thank you very much for your statement.

I have a number of questions which I would like to address to you. I had the opportunity yesterday to hear, as I indicated in my opening remarks, from lawyers who have represented the public interest and are supported by foundations or governmental funds in so doing. One of the things that came up yesterday was the suggestion that this country is one of the few countries, if not the only country in the world, that does not award attorneys’ fees to victorious plaintiffs. It was suggested the reason for this was that at the time that our judicial system was developing, it was determined that it would be best not to discourage low suits by saddling the losing party with attorneys’ fees.

Now, I am interested in your observations as to why you feel that fee-shifting in the United States would provide such an onerous burden on industry that it in fact would be intolerable, when in other countries of the world, including industrialized countries, victorious plaintiffs do receive attorneys’ fees. When you take a look at the European Common Market and Canada, private enterprise seems to be flourishing and corporations seem to be prospering.

Mr. GODOWN. I would address myself to your general question this way. Why if the system works in Europe, for instance, would it then by inference not work here. I would suggest perhaps that the European stockholders have been encouraged to expect less of a re-

turn, if you will. If there is going to be an extra cost on the corporation, then that cost is going to have to come out of the pockets of all of the owners of the corporation. That is, by definition the stockholders.

Anything to add, Mr. Tucker.

Mr. TUCKER. Nothing.

Senator TUNNEY. One of the things that we heard yesterday from our witnesses was that the Government has decided, as a matter of policy, to subsidize corporate litigation, whereas a private individual who is bringing an action in the public's interest against the corporation is not so subsidized.

The statement was made that litigation fees can be written off one's taxes if you are a corporation, and you can pay \$300 an hour to an attorney; you can pay \$500 an hour to an expert witness; an attorney can stay in the plushiest hotels and eat the finest foods while you are litigating the case. All of this is written off and 50 percent, of course, is charged to Uncle Sam. Whereas the plaintiff has to pay his attorney's fees without the same advantageous, taxwise—particularly if it is an indigent or relatively indigent plaintiff who does not enjoy the same tax advantages that would be enjoyed by a relatively prosperous corporation.

Now, what are your thoughts on that?

Let me just say, to finish the thought, perhaps fee-shifting would give to a plaintiff the opportunity to enjoy some of the same advantages that presently accrue to corporate defendants.

Mr. GODOWN. I am inclined to begin my answer by saying yes, I have stopped beating my wife, but I won't. I would answer in this fashion. I think that defending your company, so to speak, against legal suits is considered an ordinary and necessary cost of doing business. The company has no choice about this, the suit is brought against them and therefore they must undertake a legal defense. Now, the plaintiff has a choice—he can either sue or not sue. He can decide——

Senator TUNNEY. What if his health is endangered? Say that you have a situation where a chemical company is dumping toxic substances into a stream, and this particular plaintiff lives downstream and he feels that there is a substantial danger that his own health or his children's health could be endangered either because they are swimming in the river, or because the toxic substances are perculating into the table water and he draws his water from the well. And therefore he is endangered and he brings suit. Sure, he has a choice of bringing it or not bringing it, but in effect he is bringing it because he wants to protect his health.

So, if you could just use that as an example.

Mr. GODOWN. All right. If you will, Senator, then you changed the example. We are no longer talking about a business defendant. I think we are talking perhaps about a governmental defendant, because it seems to me the easiest recourse for the citizen involved is to go to the local pollution authority, to go to EPA on a national basis, to go to the public authorities, and insist that they take action under the statutes which now exist, both federally and rather broadly in the States.

Senator TUNNEY. But, you see, in that statute we provided that if the Government does not take action, there is a right to a citizen action in the courts and that was put in the law. And I happened to be one of the authors of the bill, so I know it was in the law. The reason we put it there was because we felt there would be some governmental entities that perhaps would not be prepared to utilize governmental authority to bring a court action or utilize the provisions of the bill and stop that kind of a nuisance from occurring.

And I think it is fair to say that the corporate defendant may charge off any litigation expenses that it has against its taxes, even assuming now, for point of argument, that the corporate defendant is in the wrong. Assuming that it is in the wrong, it still has the right to do that.

Now, the question is then, shouldn't we in some way try to balance out the interests between the party-plaintiff and the party-defendant by having fee-shifting in the case of a victorious plaintiff?

Mr. GODOWN. I don't think that fee-shifting would produce that result. You are talking about a party-plaintiff who is unable, in your example, to get appropriate action out of the appropriate governmental unit and therefore he must rely on his own sources.

Now, how does he do this? He finds an attorney either who is willing to take the case on a contingency basis or he finds an attorney who will take the case on a retainer, if he can afford a retainer.

I don't know how the fee-shifting would change the situation. How would providing for attorney fees by successful plaintiff cause an attorney to come forward where he would not otherwise come forward?

Senator TUNNEY. On a contingency fee basis, if the attorney won the case, he would get his litigation fees paid for.

Mr. GODOWN. But that is exactly the point, if you will, and I don't mean to be contentious or argumentative, but this is the point we are trying to develop in our testimony. If the attorney is willing to take the case on the contingency fee basis, that means, ordinarily, as the laws exist now, he will share in the award. If we ever indeed have some fee shifting legislation, it means he won't share in the award, but he will get compensation which is an extra cost the corporation would have to pay, again to use your example.

So all we are talking about really is a larger award for the plaintiff and perhaps more money for the attorney. We are not talking about the absence of legal representation for an indigent plaintiff.

Senator TUNNEY. Let's say he is not asking for damages in his prayer; let's just say he is asking for injunctive relief but he can't afford an attorney. The corporate defendant is able to charge off its legal defenses to the taxpayers, but there is no such benefit to the plaintiff.

Mr. GODOWN. I would say in that case we are talking about a relatively circumscribed circumstance, not an awfully long legal procedure and he should have recourse to public interest law firms or public interest attorneys.

Senator TUNNEY. But public interest law firms, unfortunately, for the most part represent about 1 to 2 percent of the total number of attorneys practicing before the bar and their funding is short; they

can't possibly bring all of the suits that they would like to bring. And in the case of legal service attorneys, they can only defend the totally indigent people that have less than \$4,000 for a family of four, I think the present rule is.

Yet, there are many people who earn \$8,000-\$20,000, who cannot afford to pay \$5,000 in attorneys' fees in order to get an injunction, or if it is a complicated case, \$50 to \$150-\$200 thousand dollars. I can't imagine that you are saying that their rights should go unprotected. Further, how can they protect their rights unless there is a chance in some way to have their attorneys' fees paid for if they are victorious?

Mr. GODOWN. Yes, sir. Are we not in fact talking about a situation where the net result would be that the corporate defendant would wind up with out-of-pocket costs and a shifted fee, assuming a successful suit, because a governmental entity had failed to do its job?

Senator TUNNEY. Well, that was just one example. There are examples in which you would have a claim against a corporate defendant in which you do not have a governmental agency with the responsibility for enforcing the law. A typical example, I suppose, would be where a private homeowner is suddenly confronted with an action by a corporate defendant in which the corporation was planning to put in a nuisance next door to their home. There were no Federal or State laws applicable, and where the plaintiff would have to bring his own action on behalf of himself and his neighbors, perhaps, in order to protect his interests.

Assuming that it is public policy not to use taxpayers' dollars to advantage one side or another in such a dispute, and knowing at the present time that we do advantage the corporate defendant because he can write off 50 percent of his costs against his taxes, shouldn't we have a policy whereby in some way we try to reimburse the plaintiff for his or her fees if he or she is victorious?

Mr. GODOWN. May I attempt to answer a question with a question, which is a favorite ploy of people in our profession.

Should there not also be some consideration given to the proposition that if indeed it makes sense and it works equity to have a fee shifted to the defendant where the plaintiff is successful, doesn't it follow then logically that where the defendant is successful, and has gone to considerable expense to defend himself, that he should recover his costs?

Many groundless, baseless suits are brought against many, many corporations for a variety of reasons. Some people like to read their names in the newspapers, I suspect. I think there is a case on record where someone has brought suit against General Motors on behalf of all owners of Buick automobiles between the years 1956 and 1962. My facts are probably wrong on that, but at least there is that kind of a suit.

Senator TUNNEY. As you know, the National Institute of Consumer Justice in its report released September 28, 1973, recommended that successful plaintiffs get fees as a matter of course, unless the court feels that the plaintiff's lawyer has engaged in unfair or unethical activity. A defendant would be awarded fees only where plaintiff's case was frivolous.

So that in the case of a frivolous claim, according to this recommendation, the corporate defendant would be able to collect fees from the plaintiff.

I suppose the difference is the difference in the economic situation of party-plaintiff and party-defendant, and the fact that—and one can hardly gainsay this—we do, at the Federal level give a huge subsidy to corporations for their litigation costs. I don't know what the total price tag is for litigation fees for all corporations in the United States, but I daresay it is in the billions of dollars and 50 percent of that is paid for by the taxpayers.

Mr. GODOWN. Well, I would not concede for a moment that the IRS provision which permits attorneys' fees to be charged off by defendants in a legal suit as ordinary business expense are in fact subsidies. I view them as indeed ordinary and necessary expenses, because if you don't undertake them, you might very quickly be out of business.

Senator TUNNEY. I am not suggesting, and I hope you don't take from my questioning that I am suggesting, that we pass legislation which is going to eliminate the right to charge off litigation fees against taxes. If that is a good idea, that is not at the moment the subject of consideration by this Subcommittee. I think that would require an entirely different set of hearings; and it is obvious to me that there are many instances where no one could justify a claim that the corporation should not be able to write off litigation fees.

I suppose that you could find examples where it does seem somewhat unfair to allow the charging of litigation fees to the taxpayers where the corporate officers have willfully violated the law and then in defending their violation of the law, they are able to charge the costs of litigation to the taxpayers.

But I don't want to address myself to that point today.

Mr. GODOWN. Very well. May I say for the record that I would be delighted to engage in colloquy with you on that subject.

Senator TUNNEY. I think that is something separate, but, you know, we have laws at the Federal level in which our Federal Government has decided that fee-shifting is appropriate. In employment discrimination suits, Congress has provided for fee-shifting. These employment suits are usually against large corporations and fees might be shifted whenever an entity violates the Federal law. What do you think about that provision?

Mr. GODOWN. It doesn't change my thought on the general matter of fee-shifting at all. I don't think it makes a good deal of difference whether it is a Federal or State law which is involved.

I would make this further point, however. We are here presumably discussing what may result in Federal legislation being introduced, and I would wonder what the impact of that Federal legislation would be on State courts, on plaintiffs who have a cause of action to bring in State courts and can't find attorneys to do it. My thought is, probably the majority of the problems which do exist, exist because of an abrogation of State law, rather than Federal law.

Senator TUNNEY. Well, it depends, I suppose, upon State legislatures and State courts whether or not they are going to follow the rule laid down by *La Raza*, or whether they are going to extend it or restrict it in some way. I don't think the Federal Government ought to be involved in determining what the situation is going to be in State courts. I would pose that.

But what we are grappling with here is trying to find an answer to a rather thorny problem, because it used to be that law suits involved mainly property rights, but now we are talking about law suits that involve public interest claims to a far greater extent than ever existed before—the right to a decent environment, the right to be protected from toxic substances in the water or in the air. We are talking about civil rights, protection of civil liberties; all kinds of consumer actions, class actions for antitrust relief. We are talking about a different body of law than existed before and we are talking about the right of individuals to have redress of grievances through the courts utilizing qualified attorneys. And we are talking about plaintiffs who may very well not be able to afford the law suit and the attorneys despite the fact that they have a right which deserves to be litigated.

500 largest corporations in America are responsible for, you realize that the major corporations in this country have grown bigger and bigger and bigger to the point that I daresay the 500 largest corporations are now responsible for 75 to 80 percent of the GNP. You are talking about an extraordinary mismatch, when you put an individual plaintiff who has a legitimate claim up against a large corporation who is able to charge its attorneys' fees off against its taxes, unless you have some way of fee-shifting.

I think that was the basis of the *La Raza* case. I suppose you object to the court's decision in the *La Raza* case?

Mr. Godown. Yes. Although we rather feel that is a common fund case rather than public interest case, because the people who ultimately wind up paying are all of the citizens of the State of California, for all of the money in the award is coming out of tax money.

Let me go back, if I may, and just record a few comments which your most recent remarks bring to mind. If indeed there are a good number of public interest cases which need to be brought, if we are talking about environmental issues, for instance, I cannot conceive that all of the plaintiffs involved—we are talking about the citizenry, the people who live in the surrounding area—I can't believe there aren't some attorneys there who might be willing, if they are breathing the same foul air, to take it upon themselves in exercising their own rights as citizens to bring the suit themselves. Or indeed I can't believe—I am not being facetious about this—I can't believe some citizens with resources couldn't band together and retain an attorney for a worthwhile case.

I would make this further comment again, if I may. I think rather than seeing legislation which institutionalizes fee-shifting, I would rather see the courts continue to handle this on a case-by-case basis as they have been doing, and in those instances—I wouldn't sit here for a moment and attempt to argue that there aren't individual justifiable instances where indeed somebody should be awarded fees under all of the circumstances if equity as well as justice is to be done—let the judge having heard all of the evidence make his decision. I think Judge Peckham in the Federal district court in California was marvelously inventive in fashioning his remedy. It isn't that I agree with his remedy, I applaud his legal gymnastics.

Senator TUNNEY. Of course, when you say that we ought to rely on the inventiveness of judges, we are saying what we are relying on is the willingness of courts to create entirely new law. There is some who would suggest that the courts should not be in the business of legislating but should be in the business of interpreting the law, as it is drafted by the Congress, legislatures, and as it is written in the Constitution.

And I think that when you talk about the shifting of the responsibility for paying attorneys' fees from the plaintiff to a defendant, whether it be a governmental entity or whether it be a private corporation, you are talking about a very major change in the law as we have known it. And as I say, the United States is the only country that I am aware of that has the rule that plaintiffs and defendants pick up their own costs, despite the fact the plaintiff is victorious.

So I do think it is a proper subject for legislation. Whether we ought to have the legislation or not, I suppose is a matter of opinion, and I am groping for some answers here. I think that one thing is clear. We cannot rely on local lawyers to sacrifice themselves by bringing an action which would take a very material part of their time to defend a right that is shared by a substantial group in a community. I am not saying that local lawyers, if they have a desire to do so should not do so, but I think that to say that a right is dependent upon the goodwill of a local lawyer to make a substantial financial sacrifice is not cogent, at least to my way of thinking.

Mr. GODOWN. I would simply respond, Senator, it isn't necessarily a case where a local lawyer would be donating his time if he goes for a damage award. He would share in the damages, or indeed they might all come to him.

Senator TUNNEY. We are talking, of course, not only about suits in which you have rewards but injunctive relief and sometimes these cases are incredibly detailed. We know that in environmental suits, such as the Alaska pipeline, the costs of expert witnesses and attorneys' fees for the defendants ran into the millions of dollars, and even for the plaintiffs ran in the hundreds of thousands of dollars. So you are talking about an awful lot of money.

I just can't help but believe that individuals are entitled to a greater opportunity to get into court and to have attorneys than now is provided by law. And take your own example. I am sure that you make a very good salary, but I daresay you could not afford \$25-\$30,000 in legal fees this year unless you had independent wealth that is above and beyond your salary.

Mr. GODOWN. The Senator is correct, I couldn't afford it.

Senator TUNNEY. And yet you may have a right at some point which you feel should be litigated in court and this may be a right that is particularly important if the health of your children is concerned, or the health of your wife or yourself. I just do not think that we ought to allow rights to be forfeited because people can't afford a lawyer or can't afford to get into court.

We are not talking here about a Federal grant to plaintiffs, although there are people that would argue for that. They say we ought to have a fund. When you have litigation which the public

interest is being defended, you ought to be able to draw on that fund to pay the attorneys' fees and the experts. In this discussion we are not talking about that; we are talking about fee-shifting.

I appreciate, Mr. Godown, that you came here today and gave us the benefit of your thinking. I know that you have thought about this seriously and I appreciated your commentary.

MR. GODOWN. Thank you very much, Senator. It has been our pleasure to be here.

SENATOR TUNNEY. Our next witness is Sylvia Roberts, attorney, Baton Rouge, La.; chairperson, Legal Defense Fund, National Organization for Women.

**STATEMENT OF SYLVIA ROBERTS, ATTORNEY, BATON ROUGE, LA.,
CHAIRPERSON, LEGAL DEFENSE FUND, NATIONAL ORGANIZA-
TION FOR WOMEN**

MS. ROBERTS. Thank you very much, Senator Tunney. It certainly is a privilege to be speaking to your Subcommittee from the vantage point of attorneys' fees for persons litigating sex discrimination cases under Title VII. That will be my focus in these remarks.

I might say, also, that although I am the Chairperson for the Committee on Rights for Women of the section on Individual Rights and Responsibilities of the American Bar Association, and have that expertise upon which to draw, I am not, of course, speaking for the American Bar Association, but simply as another dimension of the view that I have had of this particular issue.

I should like to request permission to furnish a written statement on the subject of attorney fees, as well as the question of legal assistance available for women, because I think that this Subcommittee cannot appreciate the problem of attorneys' fees in sex discrimination cases without having the total context of the difficulties of getting legal assistance in the first place for sex discrimination cases.

So I should appreciate very much, permission to offer a written statement on two subjects, attorneys' fees and legal assistance available to women.

SENATOR TUNNEY. Your statement will follow your testimony in the record.

MS. ROBERTS. Thank you.

Particular emphasis in my testimony will be directed at the case which I handled, which was the first case to reach the appellate level under Title VII dealing with sex discrimination and that was *Weeks v. Southern Bell Telephone and Telegraph Co.* [408 F.2d 228 (5th Cir. 1969)].

It is necessary to put that case in a little bit of a timeframe, coming up at a time when the lower courts had decided that Title VII exception of *bona fide* occupational qualification was to be given a very wide interpretation, so the exception made it very difficult for women to take advantage of Title VII. So when we came up on appeal in the *Weeks* case, after the case was lost—I did not handle the case until the appellate stage—the Fifth Circuit very rightly characterized the case as presenting important unsettled issues concerning the proper interpretation of Title VII.

And in this case, the court took the advantage of having a completely blank slate to say what the *bona fide* occupational qualification was. It was very narrow, it put the burden of proof on the employer to show that all, substantially all women, could not do the job which was in question, in order for the employer to bar all women from consideration.

So that type of definition of the previously undefined exception was extremely important, but another facet of the case which has an equal importance is the language of the court in dealing with stereotypes and which afflict women in the labor market. And I think that possibly just a couple of sentences from the opinion, which dealt with the telephone company's extreme solicitude to protect Mrs. Weeks from a higher paying job was treated in this fashion.

Moreover, Title VII rejects just this type of romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on equal footing. We cannot conclude that by including the *bona fide* occupational qualification exception Congress intended to renege on that promise.

That was in 1969. And the case was remanded for appropriate relief. I must telescope events following because it involved 2 years for us to get appropriate relief once it was found by the Fifth Circuit that indeed there was an error in the district court's decision that no violation had occurred.

I might point out to the Subcommittee that I am a lawyer in Baton Rouge in Louisiana, handling a case in Georgia. That is not at all unusual in sex discrimination cases. Even at this time in 1973, I am handling cases in Pennsylvania, Maryland, all over, because there are not trained practitioners in the field of sex discrimination.

So that during a 2-year period, I was attempting to get relief under the circumstances I described, and I might say without foundation funding. There is no foundation funding for sex discrimination cases on any kind of scale that has been made for other minority groups, and, of course, we are very happy that some minority groups have gotten foundation funding, but it certainly has not gotten into women's cases.

During all of this process of this trying to get appropriate relief, I did get a hearing a year later, and 6 months after that, the judge who had given us a hearing decided that he had a conflict of interest. So 18 months after the Fifth Circuit had ruled that the case had to be remanded, I was without a judge.

I petitioned the Chief Judge of the Fifth Circuit, John R. Brown, to attempt to have another judge furnished to me to finish up this very old case at that point. The case had been filed in 1967. I was granted the rather extraordinary privilege of having a Fifth Circuit judge designated to me in this case as a district court judge.

After that action in 1970, there followed another nine months of traveling again back and forth to Georgia to various conferences and so forth, until finally we were able to get a complete consent decree giving her total relief. It was not a settlement, it was a complete grant of every element of damage to which she was entitled, plus reinstatement back to the date of the discriminatory act.

Then came the matter of attorneys' fees, and in that connection, I think it is important to note that Southern Bell was able to muster two witnesses to testify against the affidavits which I had, from Louisiana, of course. I was in a State in which I did not practice, I didn't know anyone there to have as live witnesses. And both of the people who testified, you might say against me, knew nothing about title VII, and had not looked at my work, other than a half hour's kind of weighing of the number of pages. So this was the position I was in, in trying to prove out my attorney's fees.

And the ruling by the judge that was designated to the case, took into account that there had been this adverse testimony. Of course, I argued that it had no weight and certainly I should not be disadvantaged by that kind of really baseless testimony. However, in passing on what any attorneys' fees should be, it is important to note that the judge at no time questioned my hours, which at that time ranged in the neighborhood of some 600 hours, and instead, simply regarded the case as being one, instead of a landmark case which had had extensive impact on sex discrimination cases, not only under title VII, under the Equal Pay Act and other State statutes; instead, what the court said in setting my fees was that I had won a reversal and what the import of it was, was the characterization of the job which Mrs. Weeks wanted by the telephone company as generally strenuous and unsuited for a woman, was unsubstantiated by the evidence.

So in fact, all that was made of the decision by the court setting the fees was that it was a mere preponderance of evidence question. It was simply a matter where there had been an improper weighing of the evidence and therefore reversal was in order.

I should like to make part of the record, *Weeks v. Southern Bell* [408 F.2d 228 (5th Cir. 1969)] and "Judgment on Motions for Counsel Fees and Expenses," which is entered in this case.

Senator TUNNEY. It will be accepted and placed immediately following your testimony.

Ms. ROBERTS. Thank you.

It is very interesting to note that the court in discussing the proper fee discussed the Canon of Ethics of the American Bar Association, which sets forth all of the different criteria which I am sure have been testified at length prior to my coming here today, so I shall not go over them, but also cited a number of cases which awarded fees in the neighborhood of \$50 an hour and so forth, and yet ended up with the conclusion that I should be awarded \$15,000 for attorneys' fees, after getting full relief for Mrs. Weeks in a landmark case. And this figures out to be approximately \$25 an hour, well below the minimum fee and well below any kind of standard for any case that was cited by the court.

Some effort was made to distinguish the case as not being a class action. And, of course, by that time the case had been cited, there had been an annotation in 12 A.L.R. Fed. 15, which I think gives us some indication of the estimate in the profession about the case being a landmark decision.

So the issue of attorneys' fees was appealed. And at this stage, I might add that I again enlisted the aid of the Equal Employment Opportunity Commission who had been quite interested in this case

from the very start, but I was unable to interest them sufficiently to file *amicus curiae* brief, which I thought was unfortunate, and probably was something that would have helped.

However, *amicus curiae* briefs were filed by the NAACP, which I shall offer as part of the record; the NOW Legal Defense and Education Fund, which I shall offer as part of the record; the Mexican-American Legal Defense and Education Fund, the United Native American, Inc., and the western region of the NAACP, which I shall offer as part of the record; and the Women's Equity Action League also filed an *amicus curiae* brief, which I shall offer as part of the record.

Senator TUNNEY. It will be accepted and placed in the record immediately following your testimony.

Ms. ROBERTS. Thank you.

In relation to these *amicus curiae* briefs, the importance of the question of awarding an attorney \$25 an hour for a landmark case is clear, because this case involved a great deal of travel and a great deal of formulation of new principles for the ruling which eventually came out; was thought to be important not only as a sex discrimination case, but to the whole field of civil rights; and would have a substantial effect on subsequent cases.

I do think it is important to note in the framework of the appeal, that at this time, also going up on appeal was a case entitled *Peters v. Missouri Pacific Railway Company* [3 FEP 793 (E. D. Tex. 1971)], in which a fee approaching \$80 an hour was awarded, in a rather routine race discrimination case. In that case, the plaintiffs had had the advantage of an expert right close by in the State of Texas, who was an expert in fee setting, and had given some very good testimony, saying how difficult the case was and how title VII was a new area and certainly \$80 an hour was a very reasonable kind of fee.

Senator TUNNEY. You haven't had a final adjudication, have you, on your appeal?

Ms. ROBERTS. Yes, I have.

Senator TUNNEY. You are coming to that?

Ms. ROBERTS. This story is completed. I am afraid. And it is interesting in *Peters v. Missouri Pacific*, happily the Equal Employment Opportunity Commission filed an *amicus curiae* brief in support of the \$80, but somehow or other, the decision was made not to—perhaps there were not sufficient resources on the part of the general counsel's staff—not to file *amicus curiae* in the sex discrimination case, a first impression, in which \$15,000—figured out to be \$25 an hour, I don't mean the court stated that is what it was, but that is the only way you can figure it.

And I thought that the juxtaposition of the \$80 an hour in the *Missouri Pacific* case and the \$25 an hour in the *Weeks* case was especially perhaps fortunate because the same panel heard the two cases on the same day. I was hoping that perhaps the court might take that opportunity to say these are the standards that should obtain and perhaps that would have obviated what this Subcommittee is attempting to look into at this time.

It did not occur, and the judgment below, which again I think had an added problem of having a Fifth Circuit judge sitting by designa-

tion as a district judge, was affirmed. And I shall like to offer it as part of the record, *Weeks v. Southern Bell*, 467 F.2d 95.

Senator TUNNEY. Accepted.

Ms. ROBERTS. More or less, the import of the court's decision was that there was no abuse of discretion. And again, I think that is the wrong kind of standard in a case where you have virtually—you have no contest over the hours. There had never been any impugning of my honesty as to how many hours I spent.

Senator TUNNEY. May I just ask you this. Do you feel that the award of \$25 an hour was the result of the fact that the court thought that as a woman, \$25 an hour was the going rate, whereas \$80 an hour was the going rate for a man?

Ms. ROBERTS. Well, it certainly is what the Women's Equity Action League said in their petition for rehearing—I am going to offer that as part of the record, when the Women's Equity Action League says:

What is basically at issue in this appeal and petition for rehearing is the policy question of whether or not this Court wants to go on record as saying in effect by the amount of attorney's fee awarded that sex discrimination cases under Title VII are less important than race discrimination cases under the same law.

I think that there is a general feeling among lawyers, among judges, and all of our society, that women's work is not worth the same thing as man's work. So I don't know how far that affected the Judge's estimate of my work.

I think, also, he might have been looking at it from a personal injury standpoint of saying, if Mrs. Weeks had gotten \$31,000 in a personal injury case on appeal, you get 50 percent, so that is about 50 percent, and so that would be a good fee.

I don't think that the judge that heard the case appreciated the importance of the impact on title VII, and he did make some very interesting remarks while we were trying to get the case settled, which I think may shed some light on what the Senator is referring to.

And that is when we were having our conferences, Mrs. Weeks and I were in the judge's chambers and he said, "Mrs. Weeks, I don't think you can do this particular kind of job because I am not mechanically oriented." And I was a little puzzled by this remark, and I thought about it for a moment, and somehow, from somewhere, came the idea I might persuade him with this response, which was "Well, you know, Judge, Mrs. Weeks' husband is an electrician." There was a pause and the Judge said, "Well, that does make a difference."

Perhaps that will shed some light on the attitude which the judge had on the case. I must say, I was very happy to think of something that was meaningful to him.

The dissent by one of the judges on appeal, I think, points out that when Judge Wisdom, who sat on the original case—he sat on the panel that decided the very important content of title VII for women, and he says at 467 F. 2d 98:

With deference to Judge Bell and to the members of this panel, I feel that the attorney's fee allowed Mrs. Roberts does not reflect the difficulties she overcame nor the importance of the case in the cause of nondiscrimination against working women.

So I just want to direct the Subcommittee's attention to the fact that at least one judge on that panel felt it certainly was a—although it was not a class action, it had tremendous ramifications in the field.

We attempted to get a rehearing *en banc*, and briefs were filed by the NAACP, which I should like to offer, Mexican-American Legal Defense and Education Fund, Inc., and the western region of the NAACP, which I should like to offer.

Interestingly enough, Mexican-American Legal Defense and Educational Fund and others, offered an affidavit showing that in the area of San Francisco, that fees were being awarded on an hourly rate of \$100 an hour, and this was to lawyers who had not been in practice over 5 years. I have now been in practice over 17 years and, of course, I had been in practice many more years than five at the time of this case and handled cases of first impression prior to that.

So I felt that the Fifth Circuit might be interested in the fact that this was certainly a very unusual situation of awarding \$25 an hour.

Nonetheless, I did not prevail in my attempt to get a rehearing *en banc*, and I did not pursue it any further. I did not try to go to the Supreme Court. I felt that the precedent, unfortunately, was embedded deeply enough that I did not want it to go any further and possibly do any more damage, so that the matter now is completely closed, the fee stands in the landmark case of *Weeks v. Southern Bell*, at approximately \$25 an hour.

So that, unfortunately, while it is a disappointment to a lawyer, I suppose, not to be regarded as having efforts worth more than the minimum fee, I think it can always be pointed to as a standard for others, and it certainly again has this kind of ripple effect on other litigation. I certainly have seen it cited with respect to attorneys' fees thereafter.

I would like to go into a number of other problems which have come to me as a practitioner in the field of sex discrimination and just note that the court has already commented in one instance that it is extremely difficult to get lawyers who will handle sex discrimination cases. That is in the case of *Petete v. Consolidated Freightways*, 313 F. Supp. 1271.

It certainly is a fact that there are not lawyers who will take these cases. There are now lawyers who have the feeling that sex discrimination is not even a problem. I have heard over and over again sex was offered in the Title VII stages in the House as a joke.

This has been refuted time and time again, but the same effect of it being—I have heard Title VII referred to as a women's lib statute. I doubt it would ever be termed as a black lib or Jewish lib statute. I have heard it referred to as that by judges.

I think this whole problem of how can you get appropriate fees when you are not even taken seriously is indeed a very grave problem for lawyers, who simply don't want to get into cases where the odds are that tough. There you have to not only fight facts and expenses, but you have to fight a tremendous amount of prejudice on the part of the judiciary. And in that connection, I think it is important to note that two male law professors have analyzed court decisions, dealing with cases in which women were attempting to use the 14th amendment to have their rights recognized, and came up with the

conclusion that the opinions ranged from "poor to adominable." And this is in 46 N.Y.U. L. REV. 675 (1971) and the authors are Knapp and Johnson.

So that is a very difficult problem, in first of all getting a lawyer, and getting one who recognizes that sex discrimination is a fact and will go after the proof necessary to get the proper kind of an award.

And in that connection of getting a proper award, one difficulty which has come to me as being really crucial in this area is that attorneys for the respondents, for the companies, for unions, whoever is being sued, feel that it is perfectly legitimate to offer an attorney representing the plaintiff, the proposition that the case can be settled on the basis of attorneys' fees for the plaintiff's lawyer, but abandoning the back pay feature of the case.

When I first heard that, I thought there certainly must be something wrong in my formulation of ethical standards, but I find out that is regarded as being in the category of "there is no harm in asking." The only trouble with that is a number of people who are in this field, not being funded, at the mercy of years of protracted litigation, may find it is an offer that can't be refused, and it is extremely difficult to be put in the position of bargaining against your own client and especially with the whole idea of saying, "well, if the women are reinstated, they will make back all of that money, and you shouldn't have to worry about whether or not they get full relief."

But especially in these early cases, the precedence have to be set that women are entitled to full relief, or we wouldn't have women encouraged to even pursue these cases.

It certainly is a spectacle of the woman going through the harassment and all of the kinds of difficulties that ensue, and years later when finally the court rules she had a right to the job, she gets no back pay; you can see the effect on other employees who say, "well, it's all very nice, but I wouldn't go through that for anything. I will just stay in my low paying job." There is a tremendous depressive effect or not getting back pay for claimants.

So I would hope that there would be some manner in which it could be a part of the monitoring process, or whatever is envisioned, that the whole back pay issue is not put in opposition to attorneys' fees, and that somehow safeguards be provided.

Senator TUNNEY. Are there any movements on the part of the bar to write into the code of ethics, a provision that might relate to the problem that you are suggestion: How it would be wrong for an attorney, for instance, in an employment discrimination suit, to sell out a client's back pay award for her, or his own attorney's fees?

Ms. ROBERTS. Well, Senator Tunney, I think that is one of the situations which we give lip service to as already being in existence but there being no way to see it is implemented, that it is enforced. So I don't know if it would be a feasible remedy to restate it in more specific terms. Because I certainly think the Canons of Ethics speak to the highest level of professional dedication to a client and by definition include not bargaining against the client.

Even under the idea that they are doing it for the client's own good, to get them out of this terrible dispute that they are in and get them into the jobs, I think there is a great deal of this kind of rationalization.

I don't know whether or not you can deal with it that way. I think it perhaps can be dealt with in conferences and in a general kind of informational exchange on what is ethical conduct, and that there be sanctions taken against attorneys who violate this kind of conduct. I don't know whether it is feasible to put it in the law or to have it part of a monitoring process that the client be asked whether or not they agree to that, that there be just as in a class action settlement where there is a hearing to make sure all of the class members agree, whether that can be part of it, that there be special attention given to the fact that there is no bargaining offer of back pay for attorney fees.

Senator TUNNEY. Well, let's expand the question a bit. What suggestions do you have for insuring that attorneys' fees awards become uniform and sufficiently high to promote litigation; to make sure, for instance, that you don't have the kind of discrimination that you have suggested from your own personal experience exists now when you have female attorneys representing clients?

Ms. ROBERTS. Well, perhaps a floor could be put on it by saying that no one gets less than a minimum fee, hourly fee. However, I realize it has certain problems in that the minimum fee formulation is under attack. I think perhaps there could be an agreement just as in this expert witness in the *Missouri Pacific* case analyzed the difficulty of title VII cases and said "I think it is worth \$80 an hour." I think there could be some floor agreed upon as being a just figure and perhaps a panel of experts set up on which women were represented, in the event it was necessary to escalate it up.

Senator TUNNEY. Should that be written into the law, the fee itself, or should that be left to the discretion of the judges, or should that be left to the discretion of an independent panel, which the judge could duly constitute for the purpose of making a recommendation to the court on a case by case basis?

Ms. ROBERTS. I think the latter formulation might be the most flexible and workable. I think in that formulation there should be much consideration given and full disclosure of what the defendants are paying. I believe that point has been made earlier. And I think it certainly appeared in the affidavit I got from a labor lawyer, who said the going rate is one figure for management's side and one figure for labor's union representative attorneys, and I think that there shouldn't be a double standard there either. There certainly shouldn't be in sex discrimination and there should be representation on that independent panel of equal rights advocates and I would hasten to say that just because persons are women doesn't mean that they are particularly interested in this field either. Certainly, in the *Weeks* case a woman testified against me, and was used, I think, for that purpose.

But I think the independent panel idea the judge would refer to as far as attorneys' fees is concerned, and perhaps some kind of central informational liaison among those independent panels in which they would share information, would be helpful.

Senator TUNNEY. Do you feel plaintiffs' attorneys in these cases are entitled to the same compensation as defendant's attorneys—corporate defense attorneys?

Ms. ROBERTS. Oh, indeed. I think especially in relation to cases of first impression, they are entitled to more. The whole idea of

having to develop something out of nothing, instead of just sitting back and passively trying to fend off the above blows of plaintiffs. I think there is no comparison in the amount of effort either. So that would just provide, again, a floor. I think now the situation is we don't have anything that can check the downward estimate of fees and we need to put some kind of floor on it, so that there can be some estimate upward.

Senator TUNNEY. Did you, in your appeal, argue the point that defendant's attorneys were being paid at a rate higher than what the court had at the trial level awarded you?

Ms. ROBERTS. Well, I argued it to the extent that I knew it, but, of course, I didn't know how much they had been paid.

The other point is that they have numbers of lawyers. I might even say armies of lawyers. When you have one person who is trying to do a number of cases over a wide geographical area, I think there again there should be factors built in to allow for the kind of concentrated work necessary under difficult circumstances. Again, the idea of a floor and not a ceiling.

Senator TUNNEY. Right. Of course, Uncle Sam is picking up 50 percent of the bill for the corporate defendant, so they can afford to pay more.

Ms. ROBERTS. Yes. And, of course, I think it is interesting that I would assume they would again pass on the higher attorney fees that they would pay the plaintiffs. I suppose again that would be a business expense, wouldn't it?

Senator TUNNEY. What about an interim fee award?

Ms. ROBERTS. I think that is a most interesting idea, especially in a case such as *Weeks v. Southern Bell*, where an appeal determines that indeed there has been a violation, and that the only thing that remains is appropriate relief. So that there is no question about the case on remand being reversed or being decided in favor of the defendant. That issue is closed.

Certainly in those kinds of cases, an interim fee is eminently appropriate, because all it is is a matter of time until relief is entered. The extent of it, certainly, is not known at that point, but certainly the effort it took to get that reversal is long. I think that should be paid to the attorney on an interim basis because there would be no problem of returning it.

The other kinds of cases in which perhaps it appears at an early stage that there is a strong likelihood of success—and I just would refer to the preliminary injunction test, strong likelihood of success—that the concept that the courts have been able to deal with in that context might be borrowed and used in Title VII cases to allow attorney fees in some kind of fund at that point.

At that stage of the game another drastic drain on attorneys is discovery costs, and I think it could be part of this legislation—I don't know its full scope—but in a case where there again is a strong likelihood of success on the basis of what can be offered, perhaps from EEOC investigation and the preliminary kind of thing that didn't cost the plaintiff anything and then it is necessary for the plaintiff to engage in possibly staggering discovery costs, I think that should not be put on the litigant, but instead should be paid

by the defendant. I think that is very important because if you can't offer the proper evidence, you can have the best case in the world and you simply are going to be out of court.

Senator TUNNEY. Ms. Roberts, I am going to have to ask you to conclude your remarks, in 3 or 4 minutes.

Ms. ROBERTS. I would like to make one other comment and that is fees not be set by appellate court judges sitting as district court judges without this independent panel, which is an excellent idea, and the standard on appeal, if you do not use the independent panel idea, should not be "abuse of discretion." The standard should be the preponderance of the evidence. Because when it gets to the point of saying whether a judge abused his discretion or not, it is indeed a slippery kind of concept, and I think liable to result in injustice.

I appreciate the opportunity to be here and testify.

Senator TUNNEY. Thank you. I think the record ought to show that in the case that you handled, that the statute provides for fee-shifting.

Ms. ROBERTS. Yes, indeed.

Senator TUNNEY. So we are dealing here with a different situation than that which we addressed earlier with the former witness, when we are talking about fee-shifting with corporate defendants in a case that does not involve sex discrimination within the civil rights bill.

I think in conclusion, it is fair to say that the principle of fee-shifting means nothing unless the fee award are adequate. Do you agree?

Ms. ROBERTS. Yes. I don't know how it becomes anything but a mockery at that point, because it is simply not enough to say you should get attorneys' fees and then they are so small, nobody can afford to take the cases.

Senator TUNNEY. Thank you very much.

Ms. ROBERTS. Thank you.

[The testimony resumes at p. 1202. The following material was received for the record:]

STATEMENT REGARDING THE LACK OF LEGAL SERVICES AVAILABLE TO WOMEN GIVEN BY SYLVIA ROBERTS

I should like to supplement my testimony relative to legal fees recoverable in Title VII suits based on sex discrimination by giving some additional information on the dearth of legal services available to women who are victims of sex discrimination in employment.

In my testimony of October 5, 1973, I mentioned the case of *Petete v. Consolidated Freightways*, 313 F. Supp 1271 (N.D. Tex. 1971), in which the difficulty of finding an attorney to represent a woman claimant under Title VII was noted. Further, I alluded to the problem of prejudice against women which exists within the judiciary, see "Sex Discrimination by Law: A Study in Judicial Perspective", 46 N.Y.U. L. Rev. 675 (1971), which also affects lawyers, see, "Perceptions of Sex Discrimination in Law", 59 ABA Journal 1144 (1973). The fact that lawyers have handled civil rights cases in other areas is no guarantee they will be motivated to litigate sex discrimination cases, or that they will learn how to prove sex discrimination. I have described this problem which I have personally experienced in coming in on cases after women have had to dismiss their lawyers in an article to be published in *Trial* magazine entitled "Litigating Cases of Sex Discrimination in Employment: A Feminist Trial Lawyer's View".

Women lawyers presently constitute barely more than 3% of the profession, see "Women Lawyers: Supplementary Data to the 1971 Lawyers Statistical

Report", American Bar Foundation (March 1973), and few women are in a position to undertake sex discrimination cases due to their concentration in government employment, and in firms which have not recognized this area as a fit subject of *pro bono* work. This situation might be contrasted with litigation for blacks in which the small number of black lawyers was reinforced tremendously by whites who undertook these cases. Another interesting contrast with sex discrimination cases and those involving race discrimination, is the large number of Title VII pattern and practice suits brought by the Department of Justice for blacks in the years 1965-1972. To my knowledge, there was but one sex discrimination case in which the Department of Justice participated during this period.

Compounding the problem of the scarcity of lawyers, is the lack of resources available to those who do take sex discrimination cases. There has been no private funding of any communications network which would afford practitioners in this area an opportunity to exchange of information. This is especially helpful to one who is just starting out with the first case of this type. To show how far behind communications are in this field, it should be noted that it was not until April of 1973 that a foundation funded travel expenses of some of the persons litigating sex discrimination cases in order that they could meet. (Equal Rights Litigators Conference, April 27, 1973, convened at Ford Foundation by Ruth Ginsburg and Sylvia Roberts).

The demand for legal services by women is as yet unmeasured; however, my own records indicate that I have been contacted by over 200 women in various parts of the United States to handle employment cases of all types, blue collar, white collar, professional. Although I have made diligent efforts to become acquainted with lawyers all over the country to who such cases might be referred, in many instances I simply have no resource to offer these women. I am attaching hereto a partial list of requests for legal assistance I have received from September 1971 to September 1973, indicating that the largest number concerns discrimination in employment (Exhibit A).

In summary, in setting fees in Title VII sex discrimination cases, at an amount below the minimum fee for routine legal work (ranging from \$35.00 per hour in most state upwards), cannot be justified. In no way does such a figure take into account the difficulties of sex bias pervading our society which makes these cases so challenging, nor the hardships under which the present practitioners labor in handling these cases without resources which have been available to those handling other types of discrimination cases.

[Exhibit A]

Partial list of requests for legal assistance (September 1971-September 1973) from various parts of the United States, submitted by Sylvia Roberts, attorney, Baton Rouge, La.

<i>Category of request:</i>	<i>Number of requests</i>
Abortion-----	2
Athletics-----	6
Credit-----	6
Criminal-----	4
Domestic-----	65
Education-----	12
Employment-----	206
Employment Benefits-----	10
Government benefits (training)-----	4
Inheritance-----	4
Insurance-----	3
Military-----	5
Name-----	20
Personal injury-----	2
Residence-----	1
Miscellaneous (right to distribute self-help; membership admission to public accommodation, etc.)-----	4
Total-----	354

United States Court of Appeals, Fifth Circuit, March 4, 1969.

MRS. LORENA W. WEEKS, APPELLANT,

v.

SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY, APPELLEE.

SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY, APPELLANT,

v.

MRS. LORENA W. WEEKS, APPELLEE.

No. 25725.

Rehearing Denied March 28, 1969.

Action by female employee against her employer alleging violation of employment provisions of the Civil Rights Act. From a judgment of the United States District Court for the Southern District of Georgia, Frank M. Scarlett, J., 277 F.Supp. 117, the plaintiff appealed and the defendant cross-appealed. The Court of Appeals, Johnson, District Judge, held, inter alia, that telephone and telegraph company which denied switchman's job to applicant because applicant was a woman failed to meet burden of proving that switchman's position came within exception to general prohibition where sex is bona fide occupational qualification reasonably necessary to normal operation of particular business or enterprise.

Affirmed in part and reversed and remanded in part.

1. CIVIL RIGHTS—13

A complaint in writing timely received by the Equal Employment Opportunity Commission complaining of discrimination in employment on basis of sex timely received may be amended after the 90-day period so as to meet requirements of the Civil Rights Act. Civil Rights Act of 1964, § 706(a), 42 U.S.C.A. § 2000e-5(a).

2. CIVIL RIGHTS—13

District court did not lack jurisdiction because sworn charge of employer discrimination in employment on account of sex was not filed with Equal Employment Opportunity Commission within 90 days, where employer was in no way bothered or prejudiced by unsworn charge and received protection envisaged by Congress, especially since Commission's investigation does not commence until a sworn charge is served. Civil Rights Act of 1964, § 706(a), 42 U.S.C.A. § 2000e-5(a).

3. CIVIL RIGHTS—13

Telephone and telegraph company which denied switchman's job because applicant was a woman had burden of proof to demonstrate that such position fit within the "bona fide occupational qualification" exception to Civil Rights Act prohibiting discrimination in employment on account of sex. Civil Rights Act of 1964, § 703(a), (e)(1), 42 U.S.C.A. § 2000e-2(a), (e)(1).

4. CIVIL RIGHTS—2

Legislative history of Civil Rights Act prohibiting discrimination in employment because of sex except where sex is a bona fide occupational qualification to normal operation of particular business or enterprise indicates that such exception was intended to be narrowly construed. Civil Rights Act of 1964, § 703(a), (e)(1), 42 U.S.C.A. § 2000e-2(a), (e)(1).

5. STATUTES—236

When dealing with humanitarian remedial statute which serves an important public purpose, burden of proving an exception to general policy of statute is upon the person claiming it.

6. CIVIL RIGHTS—1

Labeling a job "strenuous" does not meet the burden of proving that the job is within bona fide occupational qualification exception to Civil Rights Act prohibiting discrimination in employment on account of sex. Civil Rights Act of 1964, § 703(a), (e)(1), 42 U.S.C.A. § 2000e-2(a), (e)(1).

7. CIVIL RIGHTS—2

The Equal Employment Opportunity Commission's guidelines are entitled to considerable weight in construing the bona fide occupational qualification exception to Civil Rights Act prohibition against discrimination in employment on account of sex. Civil Rights Act of 1964, § 703(a), (e) (1), 42 U.S.C.A. § 2000e-2(a), (e) (1).

8. CIVIL RIGHTS—13

In order to rely on the bona fide occupational qualification exception to Civil Rights Act prohibition against discrimination in employment on account of sex an employer has burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of job involved. Civil Rights Act of 1964, § 703(a), (e) (1), 42 U.S.C.A. § 2000e-2(a), (e) (1).

9. CIVIL RIGHTS—13

Telephone and telegraph company which denied switchman's job to applicant because applicant was a woman failed to meet burden of proving that switchman's position came within exception to general prohibition where sex is bona fide occupational qualification reasonably necessary to normal operation of particular business or enterprise. Civil Rights Act of 1964, § 703(a), (e) (1), 42 U.S.C.A. § 2000e-2(a), (e) (1).

Sylvia Roberts, Baton Rouge, La., Marguerite Rawalt, Arlington, Va., for appellants.

David J. Heinsma, Augusta, Ga., Hull, Towill & Norman, Augusta, Ga., of counsel, for appellee.

Before WISDOM and AINSWORTH, Circuit Judges, and JOHNSON, District Judge. JOHNSON, District Judge:

This appeal and cross-appeal present important unsettled questions concerning the proper interpretation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e et seq. Mrs. Lorena W. Weeks brought this suit against her employer, Southern Bell Telephone & Telegraph Company (hereinafter Southern Bell) pursuant to 42 U.S.C. Sec. 2000e-5(e). Mrs. Weeks, an employee of the Company for 19 years, claims that the Company's refusal to consider her application for the position of switchman constituted discrimination based solely on sex, in violation of 42 U.S.C. Sec. 2000e-2. She prayed that she be awarded the position and damages and that Southern Bell be permanently enjoined from such unlawful employment practices.

The record reveals that Mrs. Weeks submitted her bid for the job of switchman on March 17, 1966. On April 18, 1966, the Company returned her bid with a letter advising her that it had decided not to assign women to the switchman's job. On June 2, 1966, Mrs. Weeks filed a written but unsworn charge with the Equal Employment Opportunity Commission (hereinafter the Commission). A representative of the Commission secured a sworn charge from Mrs. Weeks on July 30, 1966. After investigation of the facts and analysis of the duties of the position of switchman, the Commission decided that there was reasonable cause to believe that the Company had violated the Act. Mrs. Weeks was informed on April 19, 1967, that conciliation efforts with Southern Bell had failed and that she had 30 days within which to file suit. As authorized by Section 2000e-5(e) of the Act, the District Court relieved Mrs. Weeks of the payment of costs and appointed counsel for her. Counsel filed suit on her behalf on May 18, 1967.

I

The Company moved to dismiss or in the alternative for summary judgment on the theory that since the alleged unlawful practice occurred on April 18, 1966, and a sworn charge was not filed with the Commission until July 30, 1966, the requirements of Section 2000e-5(a) and (d)¹ that the sworn charge

¹ Section 2000e-5 provides in pertinent part:

"(a) Whenever it is charged in writing under oath by a person claiming to be aggrieved, * * * that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency, or labor organization * * * with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the Commission. * * *"

"(d) A charge under subsection (a) of this section shall be filed within ninety days after the alleged unlawful employment practice occurred * * *."

be filed within 90 days had not been met and the District Court lacked jurisdiction. The contention that the District Court's overruling of this motion was error is the basis for the Company's cross-appeal.

The District Court, in effect, sustained the validity of a Commission regulation which permits amendments to the charge more than 90 days after the unlawful practice, in this case on July 30, 1966. 29 C.F.R. 1601.11(b) provides:

"Notwithstanding the provisions of paragraph (a) of this section, a charge is deemed filed when the Commission receives from the person aggrieved a written statement sufficiently precise to identify the parties and to describe generally the action or practices complained of. A charge may be amended to cure technical defects or omissions, including failure to swear to the charge, or to clarify and amplify allegations made therein, and such amendments relate back to the original filing date."

The Commission has filed a brief *amicus curiae* urging that we sustain the regulation and affirm the District Court's holding on this point.

The only case supporting the Company's contention, *Choate v. Caterpillar Tractor Co.*, 274 F.Supp. 776 (S.D.Ill. 1967), has since been overruled by the Court of Appeals for the Seventh Circuit, 402 F.2d 357. In a strongly-worded opinion, Judge Swygert held:

"We are of the view that the district court was in error in holding that its jurisdiction to entertain the suit depended upon whether the charge of discrimination filed with the Commission was under oath. Basic to our view is the fact that the 'under oath' requirement relates to the administrative procedures which are conducted by the Commission and which precede any court action. The statute gives the Commission no enforcement powers through the adjudicatory process. It allows the Commission only to investigate charges and attempt to gain compliance by informal methods of conference, conciliation, and persuasion. Enforcement of the rights of aggrieved parties resides exclusively in the federal courts. When the statute is thus considered, it is clearer that the requirement for verification of charges lodged with the Commission relates solely to the administrative rather than to the judicial features of the statute. We believe that the provision is directory and technical rather than mandatory and substantive."

[1] We agree with the Seventh Circuit and with the Commission that a complaint in writing timely received may be amended after the 90-day period so as to meet the requirements of 42 U.S.C. Sec. 2000e-5(a).²

What Chief Judge Brown, speaking for this circuit, expressed in a similar context seems relevant here:

"The legislative history is silent on the requisites of the charge. This is not unusual since the charge is the catalyst which starts the informal conciliation proceedings of EEOC. It is in keeping with the purpose of the Act to keep the procedures for initiating action simple. * * * For a lay-initiated proceeding it would be out of keeping with the Act to import common-law pleading niceties to this 'charge,' or in turn to hog-tie the subsequent lawsuit to any such concepts. All that is required is that it give sufficient information to enable EEOC to see what the grievance is all about." *Jenkins v. United Gas Corp.*, 400 F.2d 28, 30 n.3 (5th Cir. 1968).

[2] Finally, while we think it is clear that the purpose of certain of the procedural requirements of Section 2000e-5 is to protect employers from unfounded charges and harassment, it is equally clear that the employer here was in no way bothered or prejudiced by the unsworn charge and that the employer did receive the protection envisaged by Congress. In its *amicus* brief the Commission makes clear that under its procedures unsworn charges are not served upon respondents and that the investigation does not commence until a sworn charge is served. On this question, the District Court is affirmed.

² District courts in this circuit have recently come to the same conclusion. See *Georgia Power Co. v. EEOC*, 295 F. Supp. 950 (N.D. Ga. 1968); *Russell v. Alpha Portland Cement Co.* 59 CCH Lab. Cas. para. 9151, 69 L.R.R.M. 2256 (N.D. Ala. 1968). In the *Georgia Power Co.* case Judge Smith observed that "there is long-standing authority, both state and federal, to the effect that verification is an amendable defect, even for technical common-law pleadings much less a citizen-drawn statement of grievance."

II

Turning to the merits we observe that there is no dispute that Mrs. Weeks was denied the switchman's job because she was a woman, not because she lacked any qualifications as an individual. The job was awarded to the only other bidder for the job, a man who had less seniority than Mrs. Weeks. Under the terms of the contract between Mrs. Weeks' Union and Southern Bell, the senior bidder is to be awarded the job if other qualifications are met. Southern Bell, in effect, admits a prima facie violation of Section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e-2(a), which provides in pertinent part:

"(a) Employer practices.

It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's * * * sex * * *; or

(2) to limit, segregate or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's * * * sex, * * *."

Southern Bell's answer, however, asserts by way of affirmative defense that the switchman's position fits within the exception to the general prohibition of discrimination against women set forth in Section 703(e)(1), 42 U.S.C. Sec. 2000e-2(e)(1), which provides in pertinent part:

"(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, * * * one the basis of his * * * sex, * * * in those certain instances where * * * sex, * * * is a *bona fide occupational qualification* reasonably necessary to the normal operation of that particular business or enterprise, * * *" (Emphasis added.)

The job description of the post of switchman reads as follows:

"Engaged in the maintenance and operation of dial central office equipment, test, power, frame, switch, and other telephone equipment, including the locating and correcting of faults; making adjustments, additions, repairs, and replacements; performing routine operation tests, etc., and working with test-desk, field, and other forces connected with central office work. Also operates and maintains, including adjusting and making repairs to or replacement of, air conditioning equipment, and performing other work as assigned in accordance with local circumstances and the current needs of the business."

[3-5] We think it is clear that the burden of proof must be on Southern Bell to demonstrate that this position fits within the "bona fide occupational qualification" exception. The legislative history indicates that this exception was intended to be narrowly construed.³ This is also the construction put on the exception by the Equal Employment Opportunity Commission.⁴ Finally, when dealing with a humanitarian remedial statute which serves an important public purpose, it has been the practice to cast the burden of proving an exception to the general policy of the statute upon the person claiming it. *Phillips Inc. v. Walling*, 324 U.S. 490, 493, 65 S.Ct. 807, 89 L.Ed. 1095 (1942).

The more important question that must be decided here, however, is the extent of the showing required to satisfy that burden. In the court below, Southern Bell contended that a bona fide occupational qualification was created whenever reasonable state protective legislation prevented women from occupying certain positions. Southern Bell relied upon Rule 59, promulgated by the Georgia Commissioner of Labor pursuant to Section 54-122(d) of the Georgia Code, which provides:

"*Lifting*. For women and minors, not over 30 pounds. Less depending on physical condition of women or minors. Minor as used here means anyone under 18 years of age, male or females."

³ For an interpretative memorandum by Senators Clark and Chase, floor managers of the bill, suggesting that Section (703(e)(1) creates a "limited exception," see 110 Cong. Rec. 7213 (1964). See also H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963).

⁴ 29 C.F.R. Sec. 1604.1(a) (1968).

The Commission has recognized that reasonable state protective legislation may constitute a bona fide occupational qualification. Thus, Section 1604.1(3) of the Commission's guidelines provides:

"The Commission does not believe that Congress intended to disturb such laws and regulations which are intended to, and have the effect of, protecting women against exploitation and hazard. Accordingly, the Commission will consider qualifications set by such state laws or regulations to be bona fide occupational qualifications, and thus not in conflict with Title VII * * * so, for example, restrictions on lifting will be honored except where the limit is set at an unreasonably low level which could not endanger women."

Mrs. Weeks does not dispute on appeal that the position of switchman occasionally requires lifting of weights in excess of 30 pounds. She has consistently contended that the Georgia limit is unreasonably low and that the Georgia Commission of Labor's Rule 59 does not have the intent or effect of protecting women from hazard. She also contends that the rule is arbitrary in violation of the equal protection clause of the Fourteenth Amendment and that it is contrary to Title VII and thus in violation of the supremacy clause, article 6, clause 2 of the Constitution. In this regard, it may be noted that a United States District Court has recently held that provisions of the California Labor Code restricting lifting by women to weights of 25 pounds and under is a restriction set at an unreasonably low level within the meaning of the Commission's guidelines and that even if 25 pounds did not constitute an unreasonably low level within the meaning of those guidelines, such restrictions are still contrary to Title VII of the Civil Rights Act and must yield. *Rosenfield v. Southern Pacific Co.*, 293 F.Supp. 1219 (C.D.Cal. Nov. 22, 1968). In that case the Commission appeared as amicus curiae and urged the result reached by the District Court on the basis that there was an irreconcilable conflict between federal and state law which required invalidation of the state law under the supremacy clause.

We need not decide the reasonableness or the constitutionality of Rule 59, however, because effective August 27, 1968, Georgia repealed Rule 59. In its place, the Georgia Commissioner of Labor has promulgated a rule which reads: "Manual loads limited. Weights of loads which are lifted or carried manually shall be limited so as to avoid strains or undue fatigue." The decision to repeal the specific weight limit seems to have been at least partially motivated by, and is in conformity with, the recommendations of the Task Force on Labor Standards of the Citizens' Advisory Council on the Status of Women. The President's Commission pointed out:

"Restrictions that set fixed maximum limits upon weights women are allowed to lift do not take account of individual differences, are sometimes unrealistic, and always rigid. They should be replaced by flexible regulations applicable to both men and women and set by appropriate regulatory bodies."

Because the new, flexible rule does not in terms necessarily prevent all women from performing the duties of switchman, the issue of protective state legislation disappears from the case. We are left with the question whether Southern Bell, as a private employer, has satisfied its burden of proving that the particular requirements of the job of switchman justify excluding women from consideration.

In ruling for Southern Bell, the District Court relied primarily on the effect of Rule 59. It did, however, make some additional findings of fact which Southern Bell contends are sufficient to satisfy its burden:

"At the trial of the case, the evidence established that a switchman is required to routinely and regularly lift items of equipment weighing in excess of thirty (30) pounds. * * * Additionally, the evidence established that there is other strenuous activity involved in this job. * * *

"The evidence established that a switchman is subject to call out 24 hours a day and is, in fact, called out at all hours and is sometimes required to work alone during late night hours, including the period from midnight to 6 a.m. In the event of an emergency or equipment failure, the switchman would be required to lift items of equipment weighing well in excess of thirty (30) pounds."

Southern Bell puts principal reliance on the fact that the District Court found the job to be "strenuous." That finding is extremely vague. We note, moreover, that Southern Bell introduced no evidence that the duties of a switchman were so strenuous that all, or substantially all, women would be unable to perform them. Nor did the District Court make a finding on this more concrete and meaningful statement of the issue. The Commission in its investigation, on the other hand, rejected Southern Bell's contention "that the switchman job at this location requires weight lifting or strenuous exertion which could not be performed by females." In addition, Mrs. Weeks produced testimony to the effect that she was capable of performing the job, that a woman in New York had been hired as a switchman and that seven others were performing the job of frameman, the duties of which were essentially indistinguishable from those of a switchman.

[6] In examining the record carefully to interpret the finding that the duties of a switchman were "strenuous," we have observed that although Southern Bell attempted to connect a switchman's duties with various pieces of heavy equipment, only a 31-pound item called a "relay timing test set" was used "regularly and routinely" by a switchman. The testimony at trial and the Commission's investigation reveal that in actually using the set the normally accepted practice is to place the test set on the floor or on a rolling step-ladder and that very little lifting of it was required. Thus, while there would be a basis for finding that a switchman's job would require lifting technically in excess of a 30-pound weight limitation, the infrequency of the required lifting would permit quibbling over just how "strenuous" the job is. But we do not believe courts need engage in this sort of quibbling. Labeling a job "strenuous" simply does not meet the burden of proving that the job is within the bona fide occupational qualification exception.

Southern Bell also may be taken as contending that it has simply applied its own 30-pound weight limitation and that a reasonable privately-imposed weight limitation fits within the exception. In this contention, Southern Bell relies heavily on the broad construction of the exception adopted in *Bowe v. Colgate-Palmolive Co.*, 272 F. Supp. 332 (S.D.Ind.1967). In holding a privately-imposed 35-pound weight limitation within the exception, Judge Steckler stated: "Generally recognized physical capabilities and physical limitations of the sexes may be made the basis for occupational qualification in generic terms." 272 F.Supp. at 365.

As indicated above, the Commission appeared in *Rosenfeld v. Southern Pacific Co.*, *supra*, to urge that the California weight limitation legislation be struck down. In so doing, the Commission successfully contended that this broad construction of the bona fide occupational qualification exception should not be followed. The Commission's amicus brief there stated that it has consistently interpreted its regulations as being incompatible with the idea that privately-imposed weight limitations for women are within the bona fide occupational qualification exception. It has taken that position on a case involving a 35-pound weight limit. The Commission relied upon its guidelines found in 29 C.F.R. Sec. 1601.1(a):

"(1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception: (i) the refusal to hire a woman because of her sex, based on assumptions of the comparative employment characteristics of women in general.* * * (ii) the refusal to hire an individual based on stereotyped characterizations of the sexes. * * *"

The principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group."

[7] These guidelines are, of course, entitled to considerable weight. As the Supreme Court said in *Udall v. Tallman*, 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965):

"When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings. * * *"

Particularly is this respect due when the administrative practice at stake involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new."

See also *United States v. Jefferson County Board of Education*, 372 F.2d 836, 847 (5th Cir.1966), cert. denied *sub nom*, *Caddo Parish School Board v. United States* 389 U.S. 840, 88 S.Ct. 67, 19 L.Ed.2d 103.

[8] We agree with the Commission that the broad construction of the bona fide occupational qualification in *Bowe v. Colgate-Palmolive Co.*, *supra*, is inconsistent with the purpose of the Act—providing a foundation in law for the principle of nondiscrimination.⁵ Construed that broadly, the exception will swallow the rule. We conclude that the principle of nondiscrimination requires that we hold that in order to rely on the bona fide occupational qualification exception an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.

[9] Southern Bell has clearly not met that burden here. They introduced no evidence concerning the lifting abilities of women. Rather, they would have us "assume," on the basis of a "stereotyped characterization" that few or no women can safely lift 30 pounds, while all men are treated as if they can. While one might accept, *arguendo*, that men are stronger on the average than women, it is not clear that any conclusions about relative lifting ability would follow. This is because it can be argued tenably that technique is as important as strength in determining lifting ability. Technique is hardly a function of sex. What does seem clear is that using these class stereotypes denies desirable positions to a great many women perfectly capable of performing the duties involved.

Southern Bell's remaining contentions do not seem to be advanced with great seriousness. The emergency work which a switchman allegedly must perform consists primarily in the handling of a 24-pound extinguisher in the event of fire. A speculative emergency like that could be used as a smoke screen by any employer bent on discriminating against women. It does seem that switchmen are occasionally subject to late hour call-outs. Of course, the record also reveals that other women employees are subject to call after midnight in emergencies. Moreover, Title VII rejects just this type of romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on equal footing. We cannot conclude that by including the bona fide occupational qualification exception Congress intended to renege on that promise.

Having concluded that Southern Bell has not satisfied its burden of proving that the job of switchman is within the bona fide occupational qualification exception, we must reverse the District Court on this issue and hold that Southern Bell has violated 42 U.S.C. Sec. 2000e-2(a). This case is remanded to the District Court for determination of appropriate relief under the provisions of 42 U.S.C. Sec. 2000e-5(g).

Affirmed in part; reversed and remanded in part.

⁵ Our disagreement with that broad construction does not necessarily imply that we disagree with the result reached there. It should be noted that the Court there made specific findings that:

"It was not and is not practical or pragmatically possible for Colgate, in the operation of its plant, to assess the physical abilities and capabilities of each female who might seek a particular job, as a unique individual with a strength and a stamina below average or above average * * *." *Bowe v. Colgate-Palmolive Co.*, *supra*, at 357.

This finding was based on the "highly refined, bizarre, and extraordinarily complex system of seniority and job assignment in effect at the plant." *Id.* at 356. It may be that where an employer sustains its burden in demonstrating that it is impossible or highly impractical to deal with women on an individualized basis, it may apply a reasonable general rule. No such showing was made here; it seems plain that it could not be.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF GEORGIA,
SWAINSBORO DIVISION

CIVIL ACTION NO. 443

MRS. LORENA W. WEEK, PLAINTIFF
v.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, DEFENDANT

JUDGMENT ON MOTIONS FOR COUNSEL FEES AND EXPENSES

This court entered a memorandum opinion on July 1, 1971 awarding counsel fees and expenses to trial counsel, Mr. William B. Clark, and appellate counsel, Mrs. Sylvia Roberts, both as counsel for the prevailing party, Mrs. Weeks. (Copy of memorandum opinion is attached).

The following direction was given to counsel in the case:

"Counsel (Mr. Clark, Mrs. Roberts and counsel for the defendant) are directed to present a judgment accordingly with each as well as plaintiff noting that it has been approved as to form. Cf. *Miller v. Amusement Enterprises*, 5 Cir., 1970, 426 F.2d 534, 539, on the requirement that the court insure that the fees allowed are restricted to reimbursement and compensation for legal services rendered."

Counsel for the defendant has now advised the court that no agreement is possible as to the form and substance of a final order. No notice of disagreement with this representation has been received from other counsel. It also appears that the matter of counsel fees and expenses is the only pending issue in this prolonged litigation.

The purpose of obtaining approval of plaintiff as to the form of the judgment was to comply with the mandate of *Miller v. Amusement Enterprises*, 5 Cir., 1970, 426 F.2d 534, 539, that no part of the fees and expenses awarded under 42 USCA, § 2000e-5(k) are to be paid to plaintiff. Instead, however, of further extending this litigation to obtain the approval of plaintiff as to the form of judgment, it is the conclusion of the court that the mandate of *Miller v. Amusement Enterprises* will be sufficiently met by ordering and IT IS SO ORDERED that no part of the fees and expenses to be paid to counsel shall be paid over to plaintiff. It is to be noted that there has been no suggestion that any part of such fees or expenses are to be paid to plaintiff.

The court is therefore of the view that this matter should be terminated by final judgment and accordingly it is the judgment of the court that defendant pay the following sums to counsel for plaintiff:

To Mr. William B. Clark: Counsel fees—\$1,200.00, Expenses—\$25.00.

To Mrs. Sylvia Roberts: Counsel fees—\$15,000.00, Expenses—\$1,546.34.

This judgment together with the previous orders entered in favor of plaintiff by consent and otherwise, shall serve as the final judgment in this matter to the end that the litigation between the parties is and it is hereby terminated. IT IS SO ORDERED.

This 1st day of December, 1971.

GRIFFIN B. BELL,
United States Circuit Judge
sitting as a District Judge by designation.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF GEORGIA,
SWAINSBORO DIVISION

CIVIL ACTION NO. 443

MRS. LORENA W. WEEKS, PLAINTIFF

v.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, DEFENDANT

ORDER AWARDING COUNSEL FEES

This suit involved a claim for injunctive relief and damages based on alleged discrimination in employment against plaintiff by reason of her sex. 42 USCA, § 2000e-2(a). The order of this court denying the claim was reversed on appeal. *Weeks v. Southern Bell Telephone and Telegraph Company*, 5 Cir., 1969, 408 F.2d 228, with direction that appropriate relief be determined on remand. The matter was thereafter terminated by a settlement decree with the job in issue and damages including back pay being awarded to plaintiff.

The issues remaining for disposition arise out of prayers for counsel fees and expenses on the part of trial counsel and counsel thereafter handling the appeal and post-appeal matters.

The prayer of trial counsel will be first considered. Plaintiff sought the assistance of court-appointed counsel to represent her in the district court. William B. Clark of the Swainsboro Bar was duly appointed by the court pursuant to 42 USCA, § 2000e-5(e):

“ . . . Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. . . . ”

Mr. Clark prepared and filed the complaint, appeared at Brunswick, Georgia and successfully resisted defendant's motion to dismiss or for summary judgment. He spent two days in the trial of the case in addition to time spent in preparation for the motion and trial. He seeks an award of \$1,200 plus \$25.00 in travel expense (250 miles at 10¢ per mile). This is a reasonable request in the event he is entitled to a fee at all in view of the fact that he asked to be and was relieved as counsel after the adverse judgment in the district court.

The statute, 42 USCA, § 2000e-5(k) provides:

“In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, . . . ”

It is to be noted that the fee is awarded to the prevailing party and plaintiff had not prevailed at the time Mr. Clark was relieved as counsel. On the other hand, it was his work product that made the appeal possible. The rulings which he obtained on the motions were the subject of a cross-appeal by defendant and were sustained on appeal.

Moreover, the policy underlying Title VII of the Civil Rights Act of 1964, 42 USCA, § 2000e et seq., is to make counsel available for a complainant seeking relief under the Act “in such circumstances as the court may deem just.” It would disparage this policy to deny a fee and expenses to counsel as here where plaintiff eventually prevailed simply because he withdrew after trial and after filing the notice of appeal. Such a denial would add to the difficulty of finding counsel to serve by appointment, knowing that counsel must bear the risk of loss of time and expenses. The policy of the Act will be served by making counsel whole even where he determined not to pursue the appeal of an adverse judgment, leaving further proceedings, as was the case, to counsel selected by plaintiff.

As to the amount of the fee sought by Mr. Clark, no expert testimony has been offered. However, as Judge Sibley, speaking for the Fifth Circuit, observed in *Campbell v. Green*, 5 Cir., 1940, 112 F.2d 143:

“The court . . . is itself an expert on the question and may consider its own knowledge and experience concerning reasonable and proper fees

and may form an independent judgment either with or without the aid of testimony of witnesses as to value." 112 F.2d at 144.

The amount sought is deemed to be reasonable and thus a fee in the sum of \$1,200 and expenses in the amount of \$25.00 is awarded to Mr. Clark.

As to counsel who succeeded Mr. Clark, Mrs. Sylvia Roberts, the award of a fee to her together with expenses is well within the spirit of the Act. It was Mrs. Roberts who successfully appealed the case with the result of reversing the judgment of this court that the job of switchman was within the bona fide occupational qualification exception in the Act, 42 USCA, § 2000e-2(e)(1). It is true that between the judgment of this court and the appeal, the State of Georgia rescinded its prohibition against women being employed in jobs where the lifting of weights of thirty or more pounds was required. Nonetheless, this prohibition was not the sole basis of the decision of this court. The further basis was that the work of a switchman was generally strenuous and unsuited for a woman and the Fifth Circuit concluded that this characterization was unsubstantiated by the evidence. The decision of the court was a complete reversal leaving, as stated, only the question of further relief.

At this point Mrs. Roberts alleges that she had spent 333¼ hours of her time on the case and had incurred expenses of \$388.99. The time is broken into two parts: 262¼ hours in research and 71 hours in case management (conferences, court appearances, travel, and the like).

Subsequent to the Fifth Circuit reversal and in the quest for further relief, Mrs. Roberts alleges that she spent an additional 251¾ hours on the case. This involved 103 hours in research and 148¾ hours in case management. Additional expenses in the total sum of \$1,157.35 were incurred.

The expert testimony was directed to a reasonable fee for the appeal. It ranged in amounts from a low of \$2,500 to \$5,000 (one Savannah lawyer), \$6,000 (another Savannah lawyer), \$40.00 per hour (an Atlanta lawyer), and \$40.00 per hour (Louisiana lawyers). Meanwhile, Mrs. Roberts has submitted a decision of Judge Rubin in *Clark v. American Marine Corporation*, Civil Action 16315, E.D., La., dated April 24, 1970, wherein a fee of \$20,000 was awarded to the prevailing party for counsel fees in a suit brought under Title VII on proof of a time expenditure of 580 hours. The award there was for the services of multiple counsel in a class action in the trial court as distinguished from single counsel here in a non-class action but the number of hours involved is almost the same.

An additional factor to be considered is that the settlement finally consummated was very favorable to plaintiff in that she recovered in full on all claims asserted. In a consent decree, she was awarded the position originally bid for as well as \$31,497.68 in back pay and related claims.

The court has carefully considered the briefs filed in the Court of Appeals as well as the record, Mrs. Roberts' itemization of her various activities in connection with the case together with the tabulation of dates and time expenditures. The extent of the difficulty of the appeal and the subsequent efforts on remand have likewise been considered as has the expert testimony.

It must also be remembered that the fee under the Act is awarded only to the prevailing party; hence, the fee has some of the attributes of a contingent fee arrangement. The statute speaks in terms of a reasonable fee and all of the aforesaid factors are brought to bear on the question in determining reasonableness. No one factor, however, is controlling.

The court is aware of its broad discretion in setting counsel fees, *Massachusetts Mutual Life Insurance Company v. Broek*, 405 F.2d 429, 432 (5 Cir., 1968), as well as the right to employ its own expertise on the subject, *Campbell v. Green*, *supra*. Taking all of these factors into consideration, the court is of the view that a fee of \$15,000 is reasonable in the circumstances for the services of Mrs. Roberts. This sum will be awarded together with the expenses claimed which are not contested.

Counsel (Mr. Clark, Mrs. Roberts and counsel for the defendant) are directed to present a judgment accordingly with each as well as plaintiff noting that it has been approved as to form. Cf. *Miller v. Amusement Enterprises*, 426 F.2d 534, 539 (5th Cir., 1970), on the requirement that the court insure that the fees allowed are restricted to reimbursement and compensation for legal services rendered.

This 1 day of July, 1971.

GRIFFIN B. BELL,
United States Circuit Judge
sitting as a District Judge by designation.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 72-1075

MRS. LORENA W. WEEKS, *Plaintiff-Appellant*,

versus

SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY, *Defendant-Appellee*

On Appeal from the United States District Court For the Southern District of Georgia

BRIEF ON BEHALF OF PLAINTIFF, MRS. LORENA W. WEEKS AND/OR SYLVIA ROBERTS

TABLE OF CONTENTS

Statement of the case

Specification of errors

Argument

I. The court's award did not conform to the accepted criteria for setting of attorney fees

A. Labor Involved, and novelty and Difficulty of the Issues

B. The Result Achieved

C. Employment Lost Because of the Undertaking of this Litigation

D. The Nature and Length of the Professional Relationship with the Client

E. Customary Charges of the Bar for Similar Services

II. The court's award is inconsistent with other attorney fee awards in title VII cases, and will hamper the enforcement of title VII and other civil rights actions

Conclusion

Certificate

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Austin v. Reynolds Metals Co., 326 F. Supp. 1145 (E.D. Va. 1970)

Bastardo v. Warren, 332 F. Supp. 501 (W.D. Wis. 1971)

Bowe v. Colgate Palmolive Co., 272 F. Supp. 332 (S.D. Ind. 1967) reversed, 416 F.2d (7th Cir. 1969)

Cheaticood v. Southcentral Bell Tel. & Tel. Co., 303 F. Supp. 754 (M.D. Ala. 1969)

Clark v. American Marine Corp., 329 F. Supp. 709 (E.D. La. 1970) af'd 437 F.2d 959 (5th Cir. 1971)

Diaz v. Pan Am. World Airways, 442 F.2d 385 (5th Cir. 1971)

Freeman v. Ryan, 408 F.2d 1204 (D.C. Cir. 1968)

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Massachusetts Mutual Life Insurance Company v. Brock, 405 F.2d 429 (5th Cir. 1968)

Miller v. Amusement Enterprises, 426 F.2d 534 (5th Cir. 1970)

Moerman v. Zipco, Inc., 302 F. Supp. 439 (E.D. N.Y. 1969)

Muller v. Oregon, 208 U.S. 412 (1908)

New York State Division of Human Rights v. New York Pennsylvania Professional Baseball League 39 U.S.L.W. 2661 (1971)

Paolillo v. American Export Isbrandtsen Lines, Inc., 305 F. Supp. 250 (S.D. N.Y. 1969)

Peters v. Missouri Pacific Ry. Co., 3 FEP Cases 793 (E.D. Tex. 1971)

Petete v. Consolidated Freightways, 313 F. Supp. 1271 (N.D. Tex. 1970)

Phillips v. Martin Marietta Corp., 416 F.2d 1257 (5th Cir. 1969)

Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971)

Ratner v. Bakery & Confectionery Wkrs. Int'l Union, 354 F.2d 504 (D.C. Cir. 1965)

Reed v. Reed, ----- U.S. -----, 92 S.Ct. 241 (1971)

Richards v. Griffith Rubber Mills, 300 F. Supp. 338 (D. Ore. 1969)

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Rosenfeld v. Southern Pacific Company, 4 FEP Cases 72 (C.D. Cal. 1971)
Sail'er Inn v. Kirby, 95 Cal. Rptr. 329, 485 P.2d 529, 540-541 (1971)
Shultz v. Saxonburg Ceramics, Inc., 314 F.Supp. 1262 (3rd Cir. 1969) cert. denied, 90 S.Ct. 1969 (1970)
Trinity Valley Iron & Steel Company v. N.L.R.B., 410 F.2d 1161 (5th Cir. 1969)
Weeks v. Southern Bell Telephone and Telegraph Co., 408 F.2d 228 (5th Cir. 1969)

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STATUTES

42 U.S.C., Section 2000e-2(e) (1)
 42 U.S.C., Section 20003-2 (e)

STATEMENT OF THE CASE

This appeal is the final stage of a controversy which began on April 18, 1966, when Lorena Weeks was advised by defendant that it was returning her bid on the job of switchman since it had "* * * decided not to assign women to this location on a switchman's job."¹ Mrs. Weeks filed a charge with the Equal Employment Opportunity Commission, which found reasonable cause to believe defendant violated Title VII, and suit was instituted thereafter. The District Court ruled in favor of defendant. Mrs. Weeks' court appointed lawyer, Mr. William Clark, withdrew from the case, and present counsel commenced representation of Mrs. Weeks in January of 1968. This Court reversed, finding defendant breached Title VII, and remanded for further proceedings to determine appropriate relief, *Weeks v. Southern Bell Telephone and Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969).

Following this Court's decision in March, 1969, defendant filed two applications for rehearing, both of which were denied. The case, came before the Honorable Alexander A. Lawrence due to the retirement of the trial judge, the Honorable Frank M. Scarlett. A hearing was held on February 17, 1970, in Savannah, and with respect to attorney fees, counsel for plaintiff submitted an itemized list of time spent in connection with cases figured at the rate of \$40.00 per hour, together with expenses which totalled \$19,430.42. A request for an additional sum of \$6,000.00 in view of the case being one of first impression and the result achieved.

Plaintiff's counsel offered her own affidavit citing her experience and background, that of George B. Hall, the past President of the Louisiana State Bar Association; that of Edna Sakir, attorney from New Orleans Louisiana, and Jerry Bankston, a lawyer from Baton Rouge, and J. R. Goldthwaite, Jr., an attorney from Atlanta. These affidavits support the figure of \$40.00 per hour used by counsel, and it should be noted that Mr. Hall referred to the Texas Bar figure of \$50.00 per hour which is used in that state. Moreover, as Mr. Bankston stated, \$40.00 per hour would be appropriate for routine matters, and the preparation of a case of first impression is certainly more challenging than those concerns designated as routine matters. It is submitted that the figure of \$40.00 per hour is not excessive for this additional reason: the Georgia Bar schedule which gives an hourly rate of \$35.00 was published in

¹ Defendant claimed that the position of switchman fit within the bona fide occupational qualification exception to 42 U.S.C. Section 2000e-2(e)(1) and therefore it did not have to consider her for the job. One of Southern Bell's defenses was that of alleged reliance on a weight lifting regulation of the Commissioner of Labor of the State of Georgia, restricting weights that could be lifted by minors of both sexes and all women to thirty pounds.

1964 and the cost of all items has risen considerably since that date. To be exact, in 1964 the cost of all consumer items was 108.1 (Statistical Abstracts of the United States, Department of Labor) and in December, 1969, was 131.3 (Survey of Current Business, Department of Commerce). The full increase as indicated by these figures would be \$43.05.

Defendant offered the testimony of Phyllis Kravitch and Julian Corish, attorneys from Savannah, and contended that these experts stated that " * * * an average lawyer, working efficiently, would not have spent the time claimed by opposing counsel" (brief following hearing below). With all due respect to Miss Kravitch and Mr. Cornish, it will be seen that the value of their conclusions is severely limited by their brief examination of the record and briefs (one and one half hours, Miss Kravitch (TR 76), three and one half hours, Mr. Corish (TR 101). This brief encounter was the basis of setting a fee ranging between \$2,500.00 to \$5,000.00 for Miss Kravitch, and \$6,000.00 for Mr. Corish.

Miss Kravitch " * * * read it hastily. I did not study it" (TR 73); she likewise " * * * did not study the brief" (TR 74), or know how much back pay was owing (TR 88), but assumed the job of switchman paid only slightly more than Mrs. Weeks presently held (TR 87).² Can it seriously be asserted that either of these lawyers would agree to such a brief time spent in an assessment of two years of their work as a reliable method of estimating a fee due to either of them?

Most significantly, neither of these attorneys had ever handled a case arising under Title VII involving sex discrimination and knew nothing of the jurisprudence on this subject (TR 69; 101). Miss Kravitch made the statement that preparation of the brief would not take over 50 hours since the record was short (TR 64-65), and the brief could be evaluated by the number of citations contained therein and its length. Her testimony indicated her total lack of understanding of the difficulty of researching a case of first impression, which she freely admitted she had never done (TR 68; 80), and her time estimate was based on handling cases involving settled issues of law (TR 76). Miss Kravitch testified that correspondence would be unnecessary (TR 69), which defies belief when one is working with counsel in Washington, D.C., and must also correspond with the client, and other attorneys handling similar cases in this very new area of law.

Mr. Corish, on the other hand, had some brush with a case of first impression, and with cases taken over after the trial was lost (TR 109). For this reason, he set the fee at \$6,000.00 which is exactly the fee which counsel set. He was not familiar with the fact that this was the first appellate consideration of the bona fide occupational qualification of Title VII (TR 107-108), and did not think " * * * the payor should be penalized because it is a novel question" (TR 112). He also did not think that the fact that the case set a precedent affecting large numbers of women should mean that " * * * the payor in this case should be penalized one dollar for it" (TR 112). Similar testimony was given by Miss Kravitch (TR 85). Mr. Corish stated he was not familiar with the criteria of Canon 12 of the Canons of Ethics (TR 102).

Neither of the witnesses had seen counsel's itemized statement (TR 71; 102) or the supporting affidavits (TR 84; 112). Both said they had no reason to doubt counsel's veracity with respect to the time and expenses spent on the case (TR 83; 102), and had no objection to an attorney being reasonably compensated (TR 96; 117).

To sum up the testimony of Miss Kravitch and Mr. Corish, the only conclusion to be drawn is that on this first and only occasion for either of them to testify on attorney fees (TR 94; 117), they had 1) no background or experience in this area of law; 2) little time was devoted by either of them to reviewing the material on which they found an opinion and they did not examine counsel's itemized statement or supporting affidavits; 3) they did not give any weight to the result secured, and indeed did not know the significance of the court's opinion in defining the scope of the bona fide occupational qualification 4) they did not know the relief Mrs. Weeks eventually received.

Eight months after this hearing, on August 18, 1970, plaintiff's counsel was in Savannah on other business and saw Judge Lawrence, who advised her that

² At the time of trial, it was stipulated that the difference in salary was \$51.50 per week.

he felt he had a conflict of interest and expressed a desire to recuse himself.³ Counsel then wrote to The Honorable John R. Brown to request another judge be designated. The Honorable Griffin B. Bell, of this court, sitting by designation as a District Judge for the Northern District of Georgia was assigned to the case September 29, 1970, and a prehearing set for October 30, 1970, in Atlanta. Two other conferences were held in Atlanta, on November 24, 1970, and March 2, 1971,⁴ and after repeated requests by plaintiff the date of April 19, 1971 was set for another hearing.

On that date, a consent decree was entered into in which Mrs. Weeks was awarded each and every item she claimed in full, and was made whole for all damages suffered as a result of the defendant's unlawful discrimination.⁵

With respect to attorney fees, on April 19, 1971, Judge Bell requested counsel to recompute hours and expenses to show those expended prior and subsequent to this court's ruling in 1969, and reclassifying the time in different categories. This recomputation was forwarded to the Court on April 24, 1971.

Mrs. Weeks received the full amount of her award, less amounts defendant was required to withhold, shortly after April 19. Plaintiff had no contingent fee agreement with counsel, who received no portion of the funds sent to Mrs. Weeks.

Approximately two months later, after additional authorities were supplied to the court indicating later decisions citing and relying on *Weeks*, an order setting a fee of \$15,000.00 plus uncontested expenses of \$1,536.34 was entered on July 1, 1971.

Mr. Clark, Mrs. Weeks' court appointed trial counsel, was granted the full amount he requested, \$1,200.00, plus \$25.00 in travel expense.

Passing to the fee for appellate counsel, it was observed that her work had resulted in reversing the trial court in these words:

"* * * this characterization [that the work of switchman was generally strenuous and unsuited for a woman] was unsubstantiated by the evidence."

Order Awarding Counsel Fees, p. 4.

At no juncture was it noted by the court that the case presented "* * * important unsettled questions concerning the proper interpretation of Title VII * * *", *Weeks v. Southern Bell Telephone and Telegraph Co.*, *supra*, at p. 220.

It was recounted that through the appeal stage, counsel spent 333¼ hours (262¼ research; 71 in case management, conferences and the like) and expenses of \$388.89. In obtaining appropriate relief, an additional 252¼ hours was consumed (103 research; 148¼ in case management) and expenses of \$1,157.35. The opinion did not include a total number of hours, which amounts to 585.

The court stated that it took into consideration *Clark v. American Marine Corp.*, 320 F. Supp. 709 (E.D. La. 1970), affirmed, 437 F.2d 959 (5 Cir. 1971), wherein \$20,000.00 was awarded to multiple counsel who worked on the case 580 hours, and did not appeal from an unfavorable decision since the case was won initially. No indication was given as to why counsel herein should receive less than attorneys in *Clark*.

The Order Awarding Counsel Fees also mentioned that the settlement finally consummated "* * * was very favorable to plaintiff in that she recovered in full on all claims asserted." *Id.*, p. 5. The fact that no victim of sex discrimination had ever been "made whole" for all damages prior to the consent decree was omitted.

³ Judge Lawrence stated to counsel that he was the only judge in the Southern District of Georgia and did not anticipate that another judge would be appointed until at least April, 1971.

⁴ On this date an order was entered to place Mrs. Weeks in the job of switchman at Louisville effective February 28, 1971 at the top of the wage scale, of \$161.00 per week.

⁵ Plaintiff recovered \$30,761.68 as back pay, which included all the overtime earned by the incumbent, all premium pay, evening and night differentials, travel pay, expenses and interest. A most important part of the decree related to the job title being awarded as of April 24, 1966, and scores on tests not being cause for demotion. Through all conferences and proceedings since this court's ruling in 1969, plaintiff steadfastly maintained that such tests bore no relation to the job, and should not be administered since they were not administered to other persons bidding on the job of switchman in 1966.

The amount awarded was roughly 50% of the sum awarded to Mrs. Weeks,⁶ or figured on an hourly basis, \$25.64 per hour.

SPECIFICATION OF ERRORS

I. The court's award did not conform to the accepted criteria for setting of attorney fees

II. The court's award is inconsistent with other fees granted in Title VII cases, and will hamper enforcement of Title VII and other litigation arising under the Civil Right Act

ARGUMENT

I. THE COURT'S AWARD DID NOT CONFORM TO THE ACCEPTED CRITERIA FOR SETTING OF ATTORNEY FEES

Assessment of a reasonable attorney fee has often been measured by Canon 12 of the Canons of Ethics of the American Bar Association summarized in *Clark v. American Marine Corp.*, *supra*, at p. 711 as follows:

"* * * (1) the time and labor involved, and the novelty and difficulty of the issues; (2) whether other employment is lost because of the undertaking; (3) the customary charges of the bar for similar services; (4) the amount involved and the benefits resulting to the client from the services; (5) the contingency or certainty of the compensation; and (6) whether the employment is casual or for an established and constant client."

A. Labor involved, and novelty and difficulty of the issues

Title VII cases have recently been described as requiring "* * * specific and complex challenges * * * which are not common to more frequently litigated areas of the law." *Petete v. Consolidated Freightways*, 313 F. Supp. 1271 (N.D. Texas 1970). At the time Mrs. Weeks appealed to this court in 1968, there was much doubt as to the meaning of Title VII as regards its application to discrimination on the basis of sex because of the inclusion in the Act of the bona fide occupational qualification.⁷

Bowe v. Colgate Palmolive Company, 272 F. Supp. 332 (S.D. Ind. 1967), decided just prior to the trial court's ruling in *Weeks*, interpreted this exception broadly, and as a result held that "* * * generally recognized physical limitations of the sexes may be made the basis for occupational qualification in generic terms." *Id.*, at p. 365.⁸

In order for Title VII to have any real meaning for women, the exception had to be construed narrowly, and the burden of proving such qualification existed had to be placed upon the employer. In arguing for this construction, Mrs. Weeks was not only fighting ambiguity in Title VII, but also the time honored stereotypes attributed to women for centuries as justifying discrimination against them.⁹ This point is perhaps best illustrated by a question posed to counsel by Judge Lawrence during the hearing of February 17, 1970:

⁶ The court viewed the contingent fee basis as demonstrated by this passage from the Order:

"... the fee under the Act is awarded only to the prevailing party; hence the fee has some of the attributes of a contingent fee arrangement. The statute speaks in terms of a reasonable fee and all of the aforesaid factors are brought to bear on the question in determining reasonableness."

Id., at p. 6.

⁷ "Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex or national origin in those certain instances where religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business . . ." 42 U.S.C. Sec. 20003-2(e).

⁸ This decision was reversed subsequent to *Weeks*, 416 F.2d 711 (7 Cir. 1969).

⁹ "Women, like Negroes and aliens, and the poor have historically labored under severe legal and social disabilities . . . They are excluded from, or discriminated against, in employment and educational opportunities." *Sail'er Inn v. Kirby*, 95 Cal. Rptr. 329, 485 P.2d 529, 540-541 (1971).

See also, Kanowitz, *Women and the Law: The Unfinished Revolution*, (1967); Cavanagh, "A Little Dearer than his Horse": Legal Stereotypes and the Feminine Personality", 6 Harvard Civil Rights-Civil Liberties Law Review 266 (1971); "The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women", 80 Yale L. J. 871 (1971).

An Equal Pay Law was not passed until 1963, 29 U.S.C. Sec. 201, which "... sought to overcome the age-old belief in women's inferiority . . ." *Shultz v. Wheaton Glass Company*, 421 F.2d 259 (3 Cir. 1969) cert. denied, 90 S.Ct. 1696 (1970). Discrepancies between wages paid to men and women are listed in *Phillips v. Martin Marietta Corp.*, 416 F.2d 1257 (5 Cir. 1969) at pp. 1261-1262. See also the concurring opinion of Mr. Justice Marshall in *Phillips v. Martin Marietta Corp.* 400 U.S. 542 (1971), at p. 545, wherein reference is made to "... ancient canards about the proper role of women. . . ."

THE COURT. How did you get around the language of the Supreme Court that man is or should be woman's protector and defender. The natural and proper timidity and delicacy belongs to the female sex (sic) evidently unfits it for many of the occupations of Civil Rights (sic). How did you get around that?

Mrs. ROBERTS. It wasn't easy Judge * * * ^{9a}
 Transcript, p. 110.

In addition to the difficulty of the issues, the case was the first to reach any Court of Appeal in the country with respect to sex discrimination under Title VII, and the appeal was from an adverse decision based on current precedents and the persuasive contention that Lorena Weeks should be protected from a "strenuous" job, which would pay her substantially more than her "woman's job." Because of a number of decisions upholding discrimination on the basis of sex in other areas, analogies to other fields of law were difficult to find, and necessitated a creative approach in arguing for reversal of the trial court.

B. *The result achieved*

In holding that defendant had violated Title VII, the court analyzed the intent of the legislation, in particular, the bona fide occupational qualification. Recognizing that a narrow construction was the sole method by which the prohibition against sex discrimination in employment could be realized, the court formulated this doctrine:

"* * * in order to rely on the bona fide occupational qualification exception, the employer has the burden of proving that he has reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved." *Weeks v. Southern Bell Telephone and Telegraph Co.*, *supra*, at p. 235.

Since women come in all shapes, sizes and strengths, this test will not likely be met except in the rarest of instances, and thus equal opportunity in employment is secured. Had the exception been broadly interpreted as in the lower court's ruling in *Bowe*, the entire purpose of Title VII would have evaporated. Employers' subjective reasons e.g., no woman has ever held that job before; fellow employees won't like it; I don't think any women want that sort of job, and so forth, would have barred women from promotions to high paying jobs, or from being considered for "men's jobs."

Instead, this court repudiated such stereotyped thinking, and opened the door to equal opportunity to women with this forceful statement:

"Moreover, Title VII rejects just this type of romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on the bona fide occupational qualification exception Congress intended to renege on that promise."

Id., at p. 236.

These principles have been cited and relied upon in numerous cases which followed, not only arising under Title VII, but also the Equal Pay Act and

^{9a} Judge Lawrence was referring to language from the opinion of *Muller v. Oregon*, 208 U.S. 412 (1908), a case relied upon by the defendant in its brief on appeal to this court, together with other decisions of the Supreme Court designed to "protect" women e.g., *Goesaert v. Cleary*, 335 U.S. 464 (1948). Testifying to the strength of this outlook is the fact that it was not until 1971 that the Supreme Court struck down a statute discriminating on the basis of sex as offending the Fourteenth Amendment to the Constitution, *Reed v. Reed*, —U.S.—, 92 S. Ct. 251 (1971). It has been posited that in order for discrimination to rise to the level of "suspect" there must be an awareness on the part of a sufficiently large segment of the population that such classifications are probably irrational and destructive, *Bastardo v. Warren*, 332 F. Supp. 501 (W.D. Wis. 1971) at p. 504. A recent indication of such awareness may be found in a Resolution passed by the House of Delegates of the American Bar Association, February 8, 1972 supporting constitutional equality for women and urging extension of legal rights, privileges and responsibilities to all persons without regard to sex.

state cases.¹⁰ The information distributed by the Equal Employment Opportunity Commission also makes reference to the rule in *Weeks*, "Toward Job Equality for Women," p. 4. The effect of this holding takes it beyond the denomination of a class action which would affect only the employees in one plant.

Not only did the case have far reaching influence as to the delineation of the bona fide occupational qualification, but also established a precedent bearing on the elements of appropriate relief. There had been much controversy over awarding back pay when a state "protective" regulation had been in force, with most of the decisions denying such relief, *Rosenfeld v. Southern Pacific Company*, 293 F. Supp. 1218 (C.D. Cal. 1968); *Richards v. Griffith Rubber Mills*, 300 F. Supp. 338 (D. Ore. 1969). Through months and months of negotiation, plaintiff maintained that she should receive all that she lost on account of defendant's discrimination, in accordance with the standard applied in Labor Board cases, *Trinity Valley Iron & Steel Company v. N.L.R.B.*, 410 F.2d 1161 (5 Cir. 1969), and eventually her perseverance was vindicated. The consent decree is now being used by other persons seeking appropriate relief after a finding of breach of Title VII is made.

It is submitted that the District Court issuing the Order Awarding Counsel Fees, being the third District Judge to preside over this case, possibly did not have an opportunity to appraise the result factor in this case, and that such omission should be revised in light of such authorities as *Ratner v. Bakery & Confectionery Wkrs. Int'l Union*, 354 F.2d 504 (D.C. Cir. 1965); and *Freeman v. Ryan*, 408 F.2d 1204 (D.C. Cir. 1968).

C. *Employment lost because of the undertaking of this litigation*

This criterion takes into account the very real consequence of loss of remuneration from other clients while engaged in protracted litigation. In the instant case, Mrs. Weeks' court appointed attorney, advised her he would not represent her on an appeal, and she had no means of retaining a lawyer. She was able to get in contact with the Chairwoman of the Legal Committee of the National Organization for Women, Marguerite Rawalt in Washington, D.C. to seek assistance. Present counsel, who resides in Baton Rouge, Louisiana, agreed to represent Mrs. Weeks in January of 1968 although the case arose in the Southern District of Georgia.

The problems of communication over a distance of several hundred miles increased following remand of the case, and time spent in travel and being away from the office was considerable. No local counsel in Georgia was available to be present at conferences or interview witnesses prior to the hearings on February 17, 1970 and April 19, 1971. The loss of other business when there is only one lawyer handling a case in another state is readily apparent and should have been weighed.

In the *Clark* case, wherein multiple counsel participated, the court noted that "* * * perhaps a major part of plaintiff's counsel came from a lawyer who works on the staff of the NAACP Legal Defense and Educational Fund, Inc." *Id.*, at p. 711; however, this fact was not regarded as decreasing the defendant's obligation to pay reasonable attorney fees. Counsel herein has not ever belonged to any organization on which she served as a paid staff member, and necessarily defrayed the costs of handling this litigation personally as well as losing other opportunities for legal work.

D. *The nature and length of the professional relationship with the client*

Mrs. Weeks being a life-long resident of the State of Georgia, the chances of her requiring counsel's services again in a federal court action are slim. Any other type of legal proceeding in the state court could not be handled by counsel either for Mrs. Weeks or any other person whom she might refer to counsel. This criterion was not mentioned by the court in setting the fee and seemingly was not included in the court's deliberations.

¹⁰ A partial list of the cases includes *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971); *Rosenfeld v. Southern Pacific*, 444 F.2d 1219 (9 Cir. 1971); *Diaz v. Pan Am. World Airways*, 442 F.2d 385 (5 Cir. 1971); *Rosen v. Public Service Electricity and Gas Co.*, 328 F. Supp. 454 (D. N.J. 1971); *Austin v. Reynolds Metals Co.*, 327 F. Supp. 1145 (E.D. Va. 1970); *Cheatwood v. Southcentral Bell Tel. & Tel. Co.*, 303 F. Supp. 754 (M.D. Ala. 1969); Equal Pay cases are *Shultz v. Wheaton Glass Co.*, 421 F.2d 259 (3 Cir. 1970); *Shultz v. Saxonburg Ceramics, Inc.*, 314 F. Supp. 1262 (W.D. Pa. 1970); state decision: *New York State Division of Human Rights v. New York-Pennsylvania Professional Baseball League*, 39 U.S.L.W. 2661 (1971).

E. Customary charges of the bar for similar services

The affidavits furnished by plaintiff's counsel speak of a fee of \$40.00 per hour, and as Mr. Bankston observed, this figure is for routine matters, not cases of first impression. Defendant presented no evidence which would refute this figure, only testimony based on scanty study as to what other lawyers postulated would be the time involved. The case cited in the Order Awarding Counsel Fees, *Massachusetts Mutual Life Insurance Company v. Brock*, 405 F.2d 429 (5 Cir. 1968), held that the counsel for the trustee in a bankruptcy matter should be reduced to \$50.00 per hour. Nothing in the Order explains why only half of this hourly amount was awarded herein. In what was termed a simple Jones Act case, the sum of \$60.00 per hour was granted in *Paolillo v. American Export Isbrandtsen Lines, Inc.*, 305 F. Supp. 250 (S.D.N.Y. 1969). Work done at the trial level in a federal securities violation case merited \$46.00 per hour in *Moerman v. Zipco, Inc.*, 302 F. Supp. 439 (E.D.N.Y. 1969).

In view of the uncontested affidavits and the decisions awarding substantially more per hour in well settled areas of law, it is urged that the amount set in the case at bar is clearly inadequate.

II. THE COURT'S AWARD IS INCONSISTENT WITH OTHER ATTORNEY FEE AWARDS IN RECENT TITLE VII CASES, AND WILL HAMPER THE ENFORCEMENT OF TITLE VII AND OTHER CIVIL RIGHTS ACTIONS

It is counsel's position that the action of the court below in citing *Clark v. American Marine Corp.*, *supra*, and then awarding less than was granted in that case erodes the strength of the *Clark* holding. An examination of the factors in that case reveal that it dealt with race discrimination which is prohibited without a qualifying exception by Title VII. Injunctive relief without backpay was recovered following a "relatively short" trial, *Id.*, at p. 172.

Counsel submitted a statement for \$19,400.00 and were awarded \$20,000.00. In setting the fee, the court specifically relied on the Canons of Legal Ethics. Since there was no money damages received by plaintiffs, the contingent fee aspect apparently used to a great extent herein, could not have been the paramount consideration.

In addition to calling *Clark* into question as a proper formula for assessing fees, the Order in this case falls far short of the decree in *Rosenfeld v. Southern Pacific Company*, 4 FEP Cases 72 (C.D. Cal. 1971). *Rosenfeld* did involve an issue of precedential significance in that a state protective law was invalidated as being in conflict with Title VII; nevertheless, no back pay was awarded and the appeal had been from a favorable decision, *Rosenfeld v. Southern Pacific Company*, 293 F. Supp. 1819 (C.D. Cal. 1968). Several lawyers handled the case, and put in 407 hours, for which the court ordered them to be paid \$30,000.00, or \$73.75 per hour.

A case cited to the district court herein but not mentioned in the Order, *Peters v. Missouri Pacific Ry. Co.*, 3 FEP Cases 793 (E.D. Tex. 1971) also granted attorney fees over three times higher per hour than herein. In *Peters*, six plaintiffs claiming race discrimination were represented by lawyers whose time sheets showed 483 hours. No appeal was necessary, and the principle was not novel. A fee of \$44,000.00 was recovered. *Peters* and *Rosenfeld* awarded attorneys an hourly fee in harmony with the formula set forth in the amicus brief filed herein by The Western Region NAACP, The Mexican-American Legal Defense and Educational Fund, Inc. and The United Native Americans, Inc.—twice the hourly fee of \$40.00 times the number of hours expended, which in this case would be \$46,800.00.

CONCLUSION

According to the rule enunciated in *Massachusetts Mutual Life Insurance Company, supra*, at p. 432, an award of attorney fees is within the discretion of the court; nevertheless, if an abuse of that discretion is shown springing from misapprehension of the facts or application of an improper legal standard, such an award should be modified. In the case at bar, it is counsel's contention that the District Judge did not give full consideration to the facts relating to difficulty of the appeal, result achieved loss of time from other employment and lack of continuing relationship to the client. Further, the legal standard used by the court did not appear to include factors employed

by courts in *Clark*, *Rosenfeld* and *Peters*, but rather the contingent fee aspect seemed uppermost. To apply this measurement for civil rights litigation will sharply impede the rights of those suing for injunctive relief or controversies in which back pay or money damages is not deemed appropriate. This inhibition will reach Title VII cases as well as other litigation arising under the Civil Rights Acts of 1866 and 1871, see *Hammond v. Housing Authority*, 328 F. Supp. 586 (D. Ore. 1971) wherein attorney fees in a case brought under 42 U.S.C. Sec. 1983 were awarded, and *Lee v. Southern Home Sites Corp.*, 429 F.2d 290 (5th Cir. 1970), in which this court remanded an action based on 42 U.S.C. Sec. 1982 in order that findings might be made with respect to attorney fees.

The question resolves itself into a determination of whether the award below has paid "* * * the laborer the worth of his [her] hire." *Clark v. American Marine Corporation*, *supra*, at p. 711. Counsel urges that \$15,000.00 for gaining a precedent in a new and difficult filed, and thereafter full relief, which consumed 585 hours over a period in excess of three years, is most assuredly insufficient under any standard.

It is submitted that the Order Awarding Counsel Fees and judgment entered thereon should be amended to increase the amount awarded to \$46,800.00, plus a sum representing the time and expenses spent in prosecuting this appeal, *Miller v. Amusement Enterprises*, 426 F.2d 534 (5th Cir. 1970).

By Attorney :

SYLVIA ROBERTS,
Baton Rouge, La.

CERTIFICATE

I hereby certify that two copies of the foregoing Brief on behalf of Appellant have been served on counsel for defendant and those parties who seek to file Briefs Amicus Curiae, addressed as follows :

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NOW Legal Defense and
Education Fund, Inc.

Baton Rouge, La., this 15th day of February, 1972.

SYLVIA ROBERTS.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 72-1075

LORENA W. WEEKS, APPELLANT,
vs.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR THE NATIONAL
ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AS AMICUS CURIAE

TABLE OF CONTENTS

Motion for leave to file brief amicus curiae	
Interest of the National Association for the Advancement of Colored People	
Question presented	
Statement of the case	
Discussion	
An award of counsel fees is not "reasonable" within the meaning of Section 706(k) if it does not compensate the plaintiff's attorney at a rate which substantially exceeds the prevailing hourly rate of routine legal work	
Conclusion	

TABLE OF CASES

<i>Clark v. American Marine Corporation</i> , 438 F.2d 86 (4th Cir. 1971), <i>aff'd per</i> <i>curiam</i> , 437 F.2d 959 (5th Cir. 1971)	
<i>Culpepper v. Reynolds Metals Co.</i> , 442 F.2d 1078 (5th Cir. 1971)	
<i>Edmonds v. E. I. duPont deNemours & Co.</i> , 315 F.Supp. 523 (D. Kan. 1970)	
<i>Lea v. Cone Mills</i> , 438 F.2d 86 (4th Cir. 1971)	
<i>Lee v. Southern Homes Sites Corp.</i> , 444 F.2d 143 (5th Cir. 1971)	
<i>Massachusetts Mutual Life Insurance Co. v. Brock</i> , 405 F.2d 429 (5th Cir. 1968)	
<i>N.A.A.C.P. v. Button</i> , 371 U.S. 415, 443 (1963)	
<i>Newman v. Piggie Park Enterprises</i> , 390 U.S. 400 (1968)	
<i>Petete v. Consolidated Freightways, Inc.</i> , 313 F.Supp. 1271 (N.D. Tex. 1970)	
<i>Pettway v. American Cast Iron Pipe Co.</i> , 411 F.2d 998, 1005 (5th Cir. 1969)	
<i>Robinson v. Lorillard Corporation</i> , 444 F.2d 791 (4th Cir. 1971)	
<i>Rosenfeld v. Southern Pacific Co.</i> , — F. Supp. —, 4 FEP Cases 72 (C.D. Calif. 1971)	
<i>Sanders v. Russell</i> , 401 F.2d 241, 245 (5th Cir. 1968)	
<i>Weeks v. Southern Bell Telephone & Telegraph Co.</i> , 277 F.Supp. 117 (S.D. Ga. 1967)	
<i>Weeks v. Southern Bell Telephone & Telegraph Co.</i> , 408 F.2d 228 (5th Cir. 1969)	

STATUTES

Civil Rights Act of 1882, 42 U.S.C. § 1982	
Civil Rights Act of 1964	
Section 703(e) (1), 42 U.S.C. § 2000e-2(e) (1)	
Section 706(k), 42 U.S.C. § 2000e-5(k)	

MISCELLANEOUS

H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963)	
(1158)	

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 72-1075

LORENA W. WEEKS, APPELLANT,

vs.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, APPELLEE

*MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF
FOR THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF
COLORED PEOPLE AS AMICUS CURIAE*

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Association for the Advancement of Colored People respectfully moves this Court for leave to file the attached brief amicus curiae in this case for the reasons set forth below.

INTEREST OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED
PEOPLE

The National Association for the Advancement of Colored People (hereinafter "NAACP") has historically sought redress through the courts for acts of discrimination based upon race. In the critical areas of employment discrimination, the major vehicle for obtaining relief is Title VII of the Civil Rights Act of 1964. Of vital practical importance in the maintenance of any litigation effort under Title VII is the expectation of the award of attorneys' fees which provides the only hope for attorneys to have a viable practice in representing plaintiffs in employment discrimination suits. As one of the major institutional sources of funding for this important and increasingly specialized work, the NAACP is painfully aware of the small number of qualified attorneys and the limited resources available for bringing such suits. In the suits where they have been directly involved, the NAACP and other civil rights organizations provide sustaining funds for attorneys to carry on the litigation, but have not compensated the attorneys for their time. If these attorneys cannot look to full compensation and sympathetic treatment from the courts in setting attorneys fees, it will inevitably mean that the NAACP's efforts will be curtailed and that the quality and number of attorneys available to do such work will be seriously diminished. The decision of the court below denies full and adequate compensation to a successful Title VII attorney and thereby has an adverse impact on the expectation of all Title VII attorneys of obtaining adequate fees for the performing of this vitally important work in the public interest. Indeed, by granting an attorneys' fee at less than the minimal rates for routine work by attorneys in the geographic areas where the case was heard, that court denigrated the importance of Title VII work and discouraged attorney from representing Title VII plaintiffs. Thus, the decision of the court below is inimical to the public interests in ending employment discrimination, as well as to the interests of persons represented by the NAACP and to the programs for eliminating employment discrimination carried on by the NAACP.

QUESTION PRESENTED

Whether the District Court's award of counsel fees at a rate less than the prevailing minimum hourly rate for routine legal work was "reasonable" within the meaning of Section 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k).

STATEMENT OF THE CASE

This case arises on appeal by the plaintiff from an Order entered on July 1, 1971, by the United States District Court for the Southern District of Georgia awarding counsel fees amounting to \$25.64 per hour to Ms. Sylvia Roberts.

The history of this appeal begins on November 9, 1967, with the District Court's entry of judgment in favor of the defendant on the merits of the original law suit. See *Weeks v. Southern Bell Telephone & Telegraph Co.*, 277 F.Supp. 117 (S.D. Ga. 1967). At that time the court-appointed trial counsel requested and received permission to withdraw from the case. Ms. Roberts,

graduate of Tulane College of Law, former law clerk to the Chief Justice of the Supreme Court of Louisiana, and skilled attorney of ten years experience in private practice, stepped into the breach. Starting with an unfamiliar record and difficult legal issues of first impression, Ms. Roberts succeeded in establishing the merit of her client's case to this Court's satisfaction. The decision in *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969), reversed the District Court, remanded for the determination of appropriate relief, and instantly became a landmark decision in the interpretation of the "bona fide occupational qualification" exception contained in Section 703(e)(1), 42 U.S.C. § 2000e-2(e)(1). After the case was remanded, further extensive work was required before a settlement decree was entered awarding Ms. Roberts' client the job she had initially sought as well as \$31,497.68 in back pay.

In weighing how much to award as counsel fees, the District Court had before it documentation showing that 585 hours had been invested in the case subsequent to withdrawal of the original counsel, that \$40 per hour is a reasonable rate of compensation for the type of work involved, that relevant minimum fees set for routine work include \$35 for the state of Georgia where the action was brought, \$30 for the state of Louisiana, and \$35 for the area of East Baton Rouge where Ms. Roberts practices law. Yet despite this evidence and further evidence of Ms. Roberts' qualifications, of the significance and difficulty of the case, and of the importance of the victory to Ms. Weeks, only \$15,000 was awarded as counsel fees—a rate of \$25.64 per hour.

DISCUSSION

An award of counsel fees is not "reasonable" within the meaning of Section 706(k) if it does not compensate the plaintiff's attorney at a rate which substantially exceeds the prevailing hourly rate for routine legal work.

Although Title VII of the Civil Rights Act of 1964 makes specific provision for the award of counsel fees in appropriate cases, the statutory language standing alone gives little guidance as to when an award should be made or what amount might be appropriate:

In any action or proceeding under this Title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs * * * Section 706(k), 42 U.S.C. § 2000e-5(k).

However, court decisions have constricted this apparently broad discretion. In *Newman v. Piggie Park Enterprises*, 390 U.S.C. 400 (1968), the Supreme Court, construing virtually identical statutory language, stated that: "one who succeeds in obtaining an injunction under that Title should ordinarily recover an attorney's fee unless circumstances would render such an award unjust." 390 U.S. at 402. Of controlling importance to the case at hand is the reason given by the unanimous *Newman* Court for its holding:

If [the plaintiff] obtains an injunction, he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II. 390 U.S. at 402 (footnotes omitted).

The lower courts have recognized that the *Newman* holding controls actions under Title VII as well since the same considerations of public policy favor the institution of suits under that Title. See e.g., *Robinson v. Lorillard Corporation*, 444 F.2d 791 (4th Cir. 1971);¹ *Lea v. Cone Mills*, 438 F.2d 86 (4th Cir. 1971); *Clark v. American Marine Corporation*, 320 F. Supp. 709 (E.D. La.

¹ In the words of the *Robinson* court, under Title VII, as under Title II of the Civil Rights Act of 1964, attorneys' fees are to be imposed not only to penalize defendants for pursuing frivolous arguments, but to encourage individuals to vindicate the strongly expressed congressional policy against racial discrimination. The appropriate standard, therefore, is that expressed by the Supreme Court in *Newman v. Piggie Park Enterprises* * * *. 444 F.2d at 804.

1970), *aff'd per euriam*, 437 F.2d 959 (5th Cir. 1971).² However, if the ambitious and noble goal of Title VII³ is to be fulfilled, the provision in Section 706(k) for award of "reasonable" attorneys' fees can only be construed as requiring that, *as a minimum*, where an award of fees is appropriate, the amount computed on an hourly basis must substantially exceed the prevailing hourly rate for routine legal work. Any lesser standard will serve as a serious impediment to the enforcement of Title VII, for two reasons.

First, potential civil rights litigants have found it difficult to obtain counsel to represent them, because of the novelty and unpopularity of their cause. As the Supreme Court has noted in one case,

Lawsuits attacking racial discrimination, at least in Virginia, are neither very profitable nor very popular. They are not an object of general competition among Virginia lawyers; the problem is rather one of an apparent dearth of lawyers who are willing to undertake such litigation. *N.A.A.C.P. v. Button*, 371 U.S. 415, 443 (1963).

The problem has also previously been recognized by this Court: "It is no overstatement that in Mississippi and the South generally negroes with civil rights claims or defenses have often found securing representation difficult." *Sanders v. Russell*, 401 F.2d 241, 245 (5th Cir. 1968). The present case, of course, involves discrimination on the basis of sex rather than race. However, Section 706(k) makes no distinctions among the five prohibited types of discrimination; this case will necessarily be an important precedent for suits against discriminatory practices based on race, color, religion, and national origin as well as sex. Moreover, at least in the absence of a substantial retainer, attorneys have proved no more anxious to champion the rights of women than the rights of blacks. For example, in both *Edmonds v. E. I. duPont deNemours & Co.*, 315 F. Supp. 523 (D. Kan. 1970), and *Petete v. Consolidated Freightways, Inc.*, 313 F. Supp. 1271 (N.D. Tex. 1970), plaintiffs alleging discrimination on the basis of sex found it impossible to secure counsel even through the District Court in each case concluded that the plaintiff's claim was not lacking in merit.

Second, Title VII suits are extremely risky financial ventures for attorneys. This is because they are brought on behalf of working people who do not have the financial resources to hire attorneys and support complex litigation. Thus, attorneys can expect no compensation if they lose and must invest their time and money in the hope that they will be adequately compensated by the court if they succeed.⁴ If plaintiffs' attorneys must bear these risks of loss and still receive only minimum or even subminimum fees for their work when they win, there is almost no financial incentive in representing plaintiffs in such litigation. Moreover, in recent years, the growing complexity of Title VII litigation, combined with the employment by defendants of counsel of the highest ability and reputation, has increased the need for a high quality plaintiffs' Title VII bar. Without adequate assurance from the courts that plaintiffs' attorneys can receive compensation commensurate with the levels of skills involved, the hope of developing such a plaintiffs' bar vanishes and with it any chance that the litigation of Title VII suits will be anything but a "David and Goliath" battle. See *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1005 (5th Cir. 1969). Under these circumstances, a rule assuring an award of no more than the minimum hourly rate for routine work will seriously inhibit the enforcement of Title VII and is not "reasonable" within the meaning of Section 706(k). An award of less than the minimum is patently inadequate and clearly unreasonable.

² See also *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971), where this Court recognized that the congressional policy against discrimination embodied in 42 U.S.C. § 1982 requires that the *Newman* standard be applied in cases arising under that provision despite the absence of any mention of counsel fees in the statute.

³ It is * * * possible and necessary for the Congress to enact legislation which prohibits and provides the means of terminating the most serious types of discrimination. This H.R. 7152, as amended, would achieve in a number of related areas. * * * It would prohibit discrimination in employment * * *. H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963), 1964 U.S. Code Cong. and Admin. News 2391, 2393-2394.

⁴ Even where, as in the present case, a Title VII suit generates a financial recovery, such monies are in the nature of equitable restitution to plaintiff in order to make him whole (See *Robinson v. Lorillard Corp.*, *supra*) and not a fund out of which plaintiff can or should be expected to pay attorneys' fees. Thus, the sole source of compensation to attorneys representing plaintiffs in Title VII suits is the court-awarded fee and it is the sole responsibility of the court to see to it that successful plaintiffs' attorneys are adequately compensated.

The issue raised here is essentially one of first impression, although several cases have given some consideration to the adequacy of counsel fee awards. In *Culpepper v. Reynolds Metals Co.*, 442 F.2d 1078 (5th Cir. 1971), an award of \$1,500 was sustained. However, the decision does not indicate whether any evidence was presented as to either the number of hours worked or the prevailing rate for routine work. *Clark v. American Marine Corp.*, 437 F.2d 959 (5th Cir. 1971), affirmed with a one paragraph per curiam opinion an award of \$20,000 for 580 hours of work—an hourly rate of \$34.48 in contrast to the prevailing minimum rate of \$30 per hour for routine work.⁵ While it is asserted that this was not: “substantially” greater than the prevailing minimum, that issue was not presented to the court. The \$20,000 award was \$600 more than the plaintiffs’ attorneys had requested, and the appeal was taken by the defendant. The most recent decision on counsel fees also fails to discuss the standard set forth above, but effectively adopts the proposed standard by awarding \$30,000 for 407 hours of legal work or roughly \$75 per hour in a case where only injunctive relief was awarded the plaintiff. *Rosenfeld v. Southern Pacific Co.*, — F. Supp. —, 4 FEP Cases 72 (C.D. Calif. 1971).

The District Court cites *Massachusetts Mutual Life Insurance Co. v. Brock*, 405 F.2d 429 (5th Cir. 1968), for the proposition that a court has broad discretion in setting counsel fees. In that case, however, this Court reversed and remanded the District Court’s assessment of counsel fees on the specific ground that the award was in conflict with public policy: “The public interest which is inherent in bankruptcy matters must be considered in awarding fees.” 405 F.2d at 432–433. The Court pointed out that, in contrast to ordinary litigation, the amount of a fee award in a bankruptcy case should be weighed against the impact on the debtor’s estate to avoid excessively depleting the estate. In light of this policy the Court ordered “that the fees to be awarded counsel for the trustee shall not exceed \$50.00 per hour * * *.” 405 F.2d at 435.

Massachusetts Mutual Life Insurance Co. v. Brock is indeed an appropriate precedent to look to, and it points to reversal in this case. For public policy weighs equally heavy here, but on the other side of the balance. If \$50 per hour is a reasonable attorney’s fee in a bankruptcy suit where the public interest favors minimizing the impact of fees on a debtor’s estate, \$25.64 per hour is certainly not a reasonable attorney’s fee in a Title VII action where public policy favors the institution of suits to eradicate prohibited discrimination in employment. When such traditional factors as Ms. Roberts’ qualifications, the difficulty and complexity of the legal issues involved, and the result obtained for Ms. Weeks are added to the scales, there can be no question that the District Court’s award is woefully inadequate.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Ms. Roberts is entitled to compensation at a rate higher than the \$40 per hour which she has requested. To deny her the amount she seeks will be to substantially frustrate the “clear mandate from Congress that no longer will the United States tolerate this form of discrimination.” *Culpepper v. Reynolds Metals Co.*, 421 F.2d 888, 891 (5th Cir. 1970).

Respectfully submitted,

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⁵ See *Clark v. American Marine Corp.*, 320 F. Supp. 709, 712 (E.D. La. 1970).

In the United States Court of Appeals for the Fifth Circuit

No. 72-1075

MRS. LORENA W. WEEKS, PLAINTIFF,
MRS. SYLVIA ROBERTS, Attorney for Mrs. Weeks, APPELLANT

v.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,

DEFENDANT-APPELLEE

*Appeal from Orders by United States District Court, Southern District of
Georgia, Swainsboro Division concerning Attorney's Fees*

BRIEF AMICUS CURIAE OF NOW LEGAL DEFENSE AND EDUCATION FUND, INC.

PHINEAS INDRLTZ,
Acting General Counsel.
MARGUERITE RAWALT,
Counsel.
for: NOW LEGAL DE-
FENSE AND EDUCATION
FUND, INC.,
Washington, D.C.

IN THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 72-1075

MRS. LORENA W. WEEKS, PLAINTIFF;

MRS. SYLVIA ROBERTS, (Attorney for Mrs. Weeks), APPELLANT

v.

SOUTHERN BELL TELEPHONE & TELEGRAPH CO., DEFENDANT-APPELLEE

CERTIFICATE REQUIRED BY FIFTH CIRCUIT LOCAL RULE 13(A)

The undersigned, counsel of record for Now Legal Defense and Education Fund, Inc., certifies that the following listed persons or parties have an interest in the outcome of this case. These representations are made in order that Judges of this Court may evaluate possible disqualification or recusal pursuant to Local Rule 13(a):

1. Mrs. Sylvia Roberts, the appellant, who seeks a larger award of attorney's fees.
2. Southern Bell Telephone & Telegraph Company, the appellee, who would pay whatever attorney's fee is awarded in his case.
3. The uncountable persons, unknown to counsel, whose rights in other cases may be affected by the precedent established in this case.

PHINEAS INDRLTZ,
Attorney of record for
Now Legal Defense and Education Fund, Inc.,
Amicus Curiae.

TABLE OF CONTENTS

Statement of the Issue

Statement of the Case

Argument

Conclusion

Table of Cases:

Clark v. American Marine Corp. 304 F. Supp. 603, 611 (E.D.La 1969) on
remand 320 F. Supp. 709 (E.D. La 1970)

Cheatwood v. S. Central Bell Telephone & Telegraph, 303 F. Supp. 754 (M.D. Ala)
Culpepper v. Reynolds Metals Co., 421 F.2d 888 (5th Cir. 1970)
Lea v. Cone Mills Corp. 438 F.2d 86 (4th Cir. 1971)
Miller v. Amusement Enterprises, 426 F.2d 534 (5th Cir. 1970)
Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968)
Papermakers & Paperworkers, Local 18, 301 F.Supp. 905 (E.D. La 1969)
Quarles v. Philip Morris, Inc., 297 F.Supp. 505 (E.D. Va 1968)
Richards v. Griffiths Mills, 300 F. Supp. 338 (D. Oregon 1969)
Robinson v. Lorillard Corp. 444 F.2d 791 (4th Cir. 1971)
Sanders v. Russell 401 F.2d 341 (5th Cir. 1968)
Weeks v. Southern Bell Telephone & Telegraph Co., 277 F. Supp. 117 (1967, D.C. Ga) reversed and remanded 408 F.2d 228

STATEMENT OF THE ISSUE

The issue in this case is whether the District Court's orders of July 1 and December 1, 1971, directing the defendant to pay certain sums to Mrs. Sylvia Roberts (a) failed to comply with the statutory purpose of section 706(k) of the Civil Rights Act of 1964; (b) failed to award a "reasonable" attorney's fee to Mrs. Roberts in light of the work she accomplished in this case, and (c) should be amended to increase the attorney's fee to at least \$40 per hour plus \$6,000.00 for the result accomplished.

STATEMENT OF THE CASE

The defendant, Southern Bell Telephone and Telegraph Company, in 1966 denied a job as switchman to Mrs. Lorena W. Weeks, solely because of her sex. Mrs. Weeks, through court-appointed counsel, filed Civil Action No. 443 against the company in the U.S. District Court, Southern District of Georgia, Swainsboro Division, charging violation of Title VII of the Civil Rights Act of 1964 and seeking both the job and back pay. The District Court dismissed her suit in November 1967. 277 F. Supp. 117. Her court appointed lawyer declined to handle the appeal. Lacking funds to appeal, Mrs. Weeks requested aid from the National Organization for Women, and with its help retained Mrs. Sylvia Roberts to work on her case. Mrs. Roberts entered her appearance in February 1968 and continuously represented Mrs. Weeks during the next four years.

This Court reversed the District Court in March 1969 (408 F.2d 228) and upon remand, Mrs. Roberts represented Mrs. Weeks in the District Court proceedings which eventually required the company to employ Mrs. Weeks in the job she sought and pay her back pay and related claims totalling over \$31,490.00.

Mrs. Roberts claimed counsel fees at \$40 per hour for the 585 hours she worked in this case, plus \$6,000 as a fixed fee for obtaining the important and far-reaching interpretation of Title VII which will greatly aid thousands of victims of discrimination, i.e. a total counsel fee of \$29,400. In its orders of July 1 and December 1, 1971, the District Court directed the defendant to pay to Mrs. Roberts the following sums: Counsel fees—\$15,000.00, Expenses—\$1,546.34.¹

The District Court's award of counsel fees is a lump sum, and does not indicate its relationship to compensation per hour or to the fixed fee claimed by Mrs. Roberts. If the award included the \$6,000. fixed fee, the balance of \$9,000. is equivalent to not quite \$15.40 per hour. If the award does not include that fixed fee, the compensation for her entire work would be equivalent to not quite \$25.50 per hour.

ARGUMENT

There is no question here that Mrs. Roberts, as attorney for the prevailing party, is entitled to a reasonable attorney's fee as part of the court costs assessed against the defendant. Section 706(k) of the Civil Rights Act of 1964, 42 U.S. Code 2000e-5(k), states:

"In any action or proceeding under this title, the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs. . . ."

The legislative history shows that this provision was added to the bill to promote the policy of encouraging the vindication of meritorious claims,

¹ The expenses item is not questioned in this appeal.

particularly by persons of limited means. Statement of Senator Humphrey, 110 Cong. Rec. 12724.

Title VII authorizes the Equal Employment Opportunity Commission to try to abate employment discrimination, but only by means of conciliation and persuasion. Title VII also authorizes the Attorney General to file suits to abate discrimination in employment, but only in "pattern" and "practice" circumstances and within the limits of the Justice Department's personnel capability. Thus, the basic enforcement mechanism provided in Title VII is by court suits brought by private persons who have been subjected to discrimination in employment on the basis of race, color, religion, sex, or national origin.

Most job holders and job seekers subjected to such discrimination do not have much money to hire skilled lawyers to vindicate their rights. It is therefore apparent that the provision authorizing the payment of counsel fees to attorneys who successfully handle their cases would substantially encourage, and in many cases be crucial to their ability to obtain adequate legal assistance. Such attorneys are, in essence, acting as "private attorneys general furthering the national policy against discrimination" and when they prevail will ordinarily be awarded an attorney's fee. *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968); *Sanders v. Russell*, 401 F. 2d 241, 255, (5th Cir. (1968)); *Miller v. Amusement Enterprises*, 426 F. 2d 534, 536-37 (5th Cir. 1970); *Robinson v. Lorillard Corp.* 444 F. 2d 791 (4th Cir. 1971); *Lea v. Cone Mills Corp.* 438 F. 2d 86 (4th Cir. 1971); *Quarles v. Phillip Morris, Inc.* 297 F. Supp 505, 521 (E.D. Va 1968); *Clark v. American Marine Corp.*, 304 F. Supp 603, 611 (E.D. La 1969); *Cheatwood v. South Central Bell Tel & Tel Co.* 303 F. Supp 754, 760 (M.D. Ala 1969); *Richards v. Griffiths Mills* 300 F. Supp 338, 341 (D. Oregon 1969); *United States v. Papermakers and Paperworkers, Local*, 189, 301 F. Supp 905, 925 (E.D. La 1969).

The issue before this Court, therefore, is whether the attorney's fee awarded to Mrs. Roberts is a "reasonable" attorney's fee within the contemplation of Section 706(k) of the 1964 Civil Rights Act and in light of the efforts, results and other factors of Mrs. Roberts work in this case.

A broad guideline for ascertaining what is a "reasonable attorney's fee" is provided in the Code of Professional Responsibility adopted by the American Bar Association in 1969.² Disciplinary Rule 2-106(b) states, in part:

"... Factors to be considered as guides in determining the reasonableness of a fee include the following:

"(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

"(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

"(3) the fee customarily charged in the locality for similar legal services.

"(4) the amount involved and the results obtained.

"(5) the time limitations imposed by the client or by the circumstances.

"(6) the nature and length of the professional relationship with the client.

"(7) the experience, reputation, and ability of the lawyer or lawyers performing the services.

"(8) whether the fee is fixed or contingent."

The District Court's Opinion and Order of July 1, 1971, shows that it considered only some of these factors. For example, of the factors mentioned in paragraph (1) above, the District Court largely restricted itself to considering testimony by lawyers about the reasonable fee for the work on the appeal. Lawyers from Atlanta and Louisiana cited \$40. per hour as a reasonable fee, whereas two Savannah lawyers cited figures from \$2,500. to \$6,000. for the total appellate work. Neither of the Savannah lawyers cited any basis for their figures. Compare *Clark v. American Marine Corp.* 320 F. Supp 709 (E.D. La. 1970) which awarded attorneys' fees of \$20,000 for 580 hours of work, i.e., almost \$34.50 per hour.

Although the District Court stated that it considered Mrs. Roberts' briefs and her itemization of activities, and likewise the "extent of the difficulty of

² Many jurisdictions have, by Court Rule, decreed that the ABA's Code of Professional Responsibility as amended by the Court, "shall be the standard governing the practice of law" in that jurisdiction, e.g. Rule X, Rules of District of Columbia Court of Appeals governing the bar of the District of Columbia, effective April 1, 1972.

the appeal and the subsequent efforts on remand", the District Court neither cited nor discussed the nature of the legal issues, the novelty of the law and facts involved in this rapidly developing field of civil rights litigation, the benefits to the numerous thousands of men and women whose employment would be affected by the precedent achieved in this litigation, or the importance of the public policy vindicated by the litigation.

Nor did the Court refer to factors such as are mentioned in paragraph (2)—that Mrs. Roberts' fight against a large employer might adversely affect her ability to secure legal business from large employers; or in paragraph (5)—the deadlines she had to meet; or paragraph (6)—the four years she devoted to the service of her client; or paragraph (7)—the extensive experience, fine reputation, and proven ability she showed in the handling of this case.

Oddly, although the District Court received testimony from both Georgia and Louisiana lawyers that the fee customarily charged in the locality for similar services was \$40 per hour, it chose to disregard such testimony in fixing the fee at a substantially lesser level. Thus, it can hardly be said that the District Court gave much consideration to paragraph (3) of the ABA Code mentioned above.

Paragraph (8) of the ABA Code relates to whether the fee is fixed or contingent. The District Court noted that the Act authorizes an attorney's fee "only to the prevailing party" and concluded: ". . . hence, the fee has some of the attributes of a contingent fee arrangement." This cryptic conclusion is puzzling. If the Court meant that the fee should be measured by the amount of the client's recovery, as is generally true in contingent fee arrangements customary in ordinary tort actions, and arrived at \$15,000 as being almost 50 percent of the monies received by Mrs. Weeks, we submit that the District Court totally misconstrued the purpose of paragraph (8), and erroneously misapplied it to reduce the amount of Mrs. Roberts' fee. The contingent nature of a fee is a reason for awarding a *larger*, not a smaller, fee to a lawyer. In any event, because of the nature and widespread consequences of civil rights litigation, we submit that there is hardly any case, and certainly this is not such a case, in which the attorney's fee should be measured by, or not related to, the amount of money recovered by the client.

Most importantly, the District Court ignored the very purpose of Section 706(k) of the 1964 Civil Rights Act—namely, to encourage the successful prosecution of litigation against the discriminations outlawed by Title VII. If lawyers know they can earn a reasonable compensation in the difficult kind of litigation typical in civil rights suits, more good lawyers will become experts in this field and handle such cases with greater likelihood of success. If employers who discriminate know that they will be sued, probably lose, and have to pay out substantial money, it is far more likely that the Equal Employment Opportunity Commission will be able to conciliate more of its cases, and thus reduce the load on the courts. Indeed, the probability of successful litigation against discriminating employers will do more to encourage employers to stop discriminating than will any panegyrics of good intentions (whether sermons, speeches, statutes, dictums, or other exhortations) which lack enforcement.

In short, the "reasonable attorney's fee" contemplated by Section 706(k) must be one which fully compensates the attorney not only for his time and expense, but also reflects the high degree of skill needed in handling civil rights cases, the importance of the national policy vindicated by the attorney's legal work, the widespread effect of the results produced, and the purpose of encouraging the abatement of the invidious discrimination outlawed by Title VII.

It is "the duty of the courts to make sure the Act works". *Culpepper v. Reynolds Metals Co.*, 421 F. 2d 888, 891 (CA 5, 1970). One of the ways to make the Act work is to apply section 706(k) liberally to insure that victims of discrimination will have lawyers to prosecute their meritorious claims. Thus, the "reasonable attorney's fee" must be one which is fully competitive with fees the attorney could earn in cases of equal difficulty, novelty, and (in some places) unpopularity. Then, and only then, will the lawyers for the poor and disadvantaged be able to prepare and litigate as thoroughly as the lawyers representing large employers.

The evidence in this case shows that Mrs. Roberts met and handled with great ability new and difficult questions involving the first application of Title VII in a sex discrimination suit. She undertook her work in the face of an adverse decision in the District Court, thus having a greater burden than would be entailed at the level of an uncommitted court of first instance. Civil rights litigation is complex and difficult, and demands a wide variety of skills. The precedents were scanty. The necessary research on the legislative purpose was handicapped by the spotty legislative history of Title VII and inadequate hearing records. The litigation would affect the lives of untold numbers of middle income working women. The search for analogies in the law required re-examination of the whole nationwide bulk of so-called "protective" laws on women. This was, indeed, a "David-versus-Goliath" encounter, a single woman attorney subsisting in her own private practice but strengthened by her sense of justice, against an array of attorneys in powerful and prestigious law firms in the command and employ of one of the largest corporations of the South.

Furthermore, it was apparent, both to Mrs. Roberts and Mrs. Weeks, that the requirements of prosecuting this vigorously contested case over the almost 4 years since Mrs. Roberts began her work, would preclude Mrs. Roberts, a capable attorney of years of experience and high standing in her profession, from other employment and particularly involve forfeiting opportunity to have large corporate employers as clients. Mrs. Roberts' claim of \$40 per hour was based on the fees customarily charged in Georgia, the forum of the suit, and in Louisiana, the site of her practice, and the propriety of such charge was substantiated by expert witnesses. Indeed, we submit that the rate should have been greater than that customarily charged by attorneys, because her compensation was contingent on winning, her work involved novel and complex issues presented for the first time to an appellate court in the context of a broad based national statute, and her efforts resulted in a landmark ruling by this Court that will affect thousands of persons. This Court said, in *Miller v. Amusement Enterprises*, 426 F. 2d 534 (1970):

"Congress did not intend that vindication of statutorily guaranteed rights would depend on the rare likelihood of economic resources in the private party (or class members) or the availability of legal assistance from charity—individual, collective, or organized. An enactment aimed at legislatively enhancing human rights and the dignity of man through equality of treatment would hardly be served by compelling victims to seek out charitable help."

We urge that a "reasonable attorney's fee" in this case requires an award of at least the amount claimed by Mrs. Roberts, to-wit: \$40 per hour, plus \$6,000 fixed fee.

Respectfully submitted.

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U.S. Court of Appeals for the Fifth Circuit

No. 72-1075

MRS. LORENA WEEKS, PLAINTIFF-APPELLANT

v.

SOUTHERN BELL TELEPHONE & TELEGRAPH CO., DEFENDANT-APPELLEE

*Appeal from the U.S. District Court for the Southern District of Georgia—
Brief Amicus Curiae of The Western Region, NAACP, The Mexican-
American Legal Defense and Educational Fund, Inc., and The United
Native Americans, Inc.*

TABLE OF CONTENTS

Table of Authorities

Statement of the Case and Summary of Argument

Argument

- I. The order of the district court awards inadequate and unreasonable attorney's fees, thwarts the purpose of Title VII of the Civil Rights Act and should be reversed
 - A. Purpose of the Attorney's fee provision
 - B. The order below is unreasonable and inadequate
 - C. Fees should be awarded in accordance with the adequate counsel for the public interest plan .

Conclusion

TABLE OF AUTHORITIES

Cases:

- Bowe v. Colgate-Palmolive Co.*, 416 F. 2d 711 (7th Cir. 1969)
Columbian Nat. Life Ins. Co., v. Keyes, 138 F. 2d 382 (8th Cir. 1943), cert. den. 321 U.S. 765 (1944).
First Nat. Bank of Fort Worth v. United States, 301 F. Supp. 667 (N.D. Tex. 1969)
Harris v. Chicago Great W. Ry., 197 F. 2d 829 (7th Cir. 1952)
Jenkins v. United Gas Corp., 400 F. 2d 28 (5th Cir. 1968)
Miller v. Amusement Enterprises, Inc., 426 F. 2d 534 (5th Cir. 1970).
Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968)
Paolillo v. American Export Isbrandtsen Lines, Inc., 305 F. Supp. 250 (S.D. N.Y. 1969).
Rosenfeld v. Southern Pacific Company, Civ. No. 67-1377-F, Findings of Fact and Conclusions of Law Re: Attorney's Fees, C.D. Cal., Dec. 2, 1971.
Silver v. Rosenberg, 139 F. 2d 1020 (2d Cir. 1944).
Weeks v. Southern Bell Tel. & Tel. Co., 408 F. 2d 228 (5th Cir. 1969).

Statutes:

- 42 U.S.C. § 2000e *et seq.*
42 U.S.C. § 2000e-5(k)

Miscellaneous:

- Hornstein, *Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards*, 69 Harv. L. Rev. 658 (1956).
Walker, *Title VII: Complaint and Enforcement Procedures and Relief and Remedies*, 7 B.C. Ind & Com. L. Rev. 495 (1966).

STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

The award of attorney's fees to the prevailing party in litigation brought under the Civil Rights Act of 1964 is intended to encourage individuals injured by the prohibited discrimination to seek judicial relief. *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968).¹

¹ *Newman* was a case brought under Title II of the 1964 Civil Rights Act, claiming discrimination in public accommodation because of race. Its reasoning has been extended to cases brought under Title VII, see, *Jenkins v. United Gas. Corp.*, 400 F.2d 28 (5th Cir. 1968), and cases involving sex discrimination in employment. See, *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 720 (7th Cir. 1969).

Lorena Weeks, the plaintiff in this case sought judicial relief under Title VII of the 1964 Civil Rights Act for sex discrimination in employment, 42 U.S.C. § 2000e *et seq.* After the successful conclusion of over three years of representation of the plaintiff, Sylvia Roberts, attorney for the plaintiff, prayed for attorney's fees from the district court under the specific statutory authorization contained in Title VII, 42 U.S.C. § 2000e-5(k).² She sought compensation at the rate of \$40 an hour, plus a fixed fee of \$6,000 for the result obtained on appeal.³

The District Court found that "the award of a fee to [the attorney for the plaintiff] is well within the spirit of the Act." The Court further noted that MS. ROBERTS' effort on appeal had caused the Fifth Circuit to reverse the initial negative decision by the District Court. Memorandum Opinion and Order Awarding Counsel Fees, July 6, 1971.

However, the District Court awarded MS. ROBERTS attorney's fees at the rate of only \$25 an hour, for a total fee of \$15,000.⁴ This award is between one-fourth and one-third *below* the *minimum* hourly fee schedules established in the states of Georgia, Louisiana and Texas.⁵

Such an award, considering the nature of the case and the benefit conferred by the results upon present and future working women, borders on the insulting. The award can only discourage members of the private bar from participating in any litigation attacking discrimination in employment. In effect, the District Court has announced to the bar that substantial financial sacrifice will be demanded from attorneys who represent plaintiffs such as Lorena Weeks.

The order of the District Court effectively thwarts the prime objective of the counsel fee provision of the Civil Rights Act of 1964—the encouragement of litigation seeking judicial relief for these wrongs. The statute directs that the court award "reasonable attorney's fees" as part of the costs in Title VII litigation, 52 U.S.C. § 2000e-5(k). A fee award so directly contrary to the purposes of the statute cannot be considered reasonable. An order which so clearly disregards the purpose and language of the statute is an abuse of discretion and must be reversed.

Attorney's fees should be awarded in accordance with the Adequate Counsel for the Public Interest Plan set forth herein in order to achieve the purposes of Title VII of the Civil Rights Act of 1964.

ARGUMENT

I. THE ORDER OF THE DISTRICT COURT AWARDS INADEQUATE AND UNREASONABLE ATTORNEY'S FEES, THWARTS THE PURPOSE OF TITLE VII OF THE CIVIL RIGHTS ACT AND SHOULD BE REVERSED.

A. Purpose of the attorney's fee provision.—The Civil Rights Act of 1964 embodies "a policy that Congress considered of the highest priority." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). A private litigant, invoking the jurisdiction of the federal courts to vindicate the rights guaranteed by the statute, "takes on the mantle of the sovereign," *Jenkins v. United Gas Corp.*, 400 F. 2d 28, 32 (5th Cir. 1968), and, as a private attorney general, advances a defined public interest in the elimination of the prohibited discrimination. *Newman*, 390 U.S. at 402.

As a vital part of this statutory scheme for private enforcement of the public interest, Congress provided that reasonable attorney's fees could be awarded as part of the costs to the prevailing party. 42 U.S.C. § 2000e-5(k). These fees are awarded "not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief. . . ." *Newman*, 390 U.S. at 402 (footnotes omitted).

² "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs. . . ." 42 U.S.C. § 2000e-5(k).

³ The out-of-pocket expenses claimed were not contested below and were granted. That amount is not in issue on this appeal.

⁴ The time sheets submitted in this matter showed plaintiff's attorney expended 585 hours on the various proceedings in this case. The Memorandum Opinion of the District Court indicates that the accuracy of these itemizations was accepted.

⁵ The minimum hourly fee in Georgia under a 1964 fee schedule is \$35.00. The Louisiana fee under a 1963 schedule is \$30.00; and in Baton Rouge, the fee is \$35.00 for routine matters. (Affidavit of Jerry H. Bankston). The fee schedule for Texas established in 1968 is \$40.00 an hour. (Affidavit of George B. Hall).

An attorney's fee awarded under the provisions of the Civil Rights Act of 1964 must be in harmony with the announced intent of the legislation, to encourage private litigation to remedy violations of the statute. Therefore, the fees granted must be sufficient to guarantee effective and vigorous representation of the plaintiffs interests. Such representation can only be assured if the fee is competitive with the compensation which an attorney could anticipate in other fields of litigation. The financial benefit must be sufficient to attract members of the private bar to a field which, even now, remains complex, novel and unpopular.

This Circuit has declared:

"Congress did not intend that vindication of statutorily guaranteed rights would depend on the rare likelihood of economic resources in the private party (or class members) or the availability of legal assistance from charity—individual, collective, or organized. An enactment aimed at legislatively enforcing human rights and the dignity of man through equality of treatment would hardly be served by compelling victims to seek out charitable help." *Miller v. Amusement Enterprises, Inc.*, 426 F. 2d 534 (5th Cir. 1970).

This Court, with its experience in employment discrimination litigation, must perceive that only assurance of an adequate and competitive fee, will stimulate the participation of the private bar to the extent necessary to achieve the purposes of the counsel fee provision. Only an adequate and competitive fee will insure the availability of "non-charitable" legal representation. Organizations such as those submitting this brief cannot fill the need. Nor should potential plaintiffs be forced to choose only from a limited field of private attorneys whose enthusiasm for the cause of civil rights makes them willing to sustain a financial sacrifice in order to further that cause.

As one commentator has noted concerning attorney's fees in Title VII cases:

"The system of individual enforcement was the result of a conscious, explicit rejection of a system of administrative enforcement, and liberal awards of attorney's fees to successful complainants are necessary if the system is to work as intended." (emphasis added).⁶

Appellate courts are themselves experts as to the reasonableness of attorney's fees. This Court may, in the interest of justice, fix fees of counsel, even though its decision conflicts with that of the trial court. See, e.g., *Columbian Nat. Life Ins. Co. v. Keyes*, 138 F. 2d 382, 385 (8th Cir. 1943), cert. den. 321 U.S. 765 (1944); *First Nat. Bank of Fort Worth v. United States*, 301 F. Supp. 667, 675 (N.D. Tex. 1969).

Thus, this Court has the authority and a unique opportunity to set a standard in the award of attorney's fees which will not only encourage, but will virtually guarantee, the vindication of the rights which Congress intended to protect.

B. The order below is unreasonable and inadequate.—The award granted by the District Court in this case is from one-fourth to one-third below the minimum hourly fee established by the fee schedules of Georgia, Louisiana and Texas. In no sense can such an award be deemed competitive with the remuneration counsel could receive by devoting time to any other imaginable cause of action.

The award is unreasonable in the strictest comparison of dollar return for time invested. In addition, the award entirely ignores the fact that litigation such as the case at bar is undertaken in the face of substantial hostile community pressure, pressure which may often rise to a level of conflict with the interests of other potential clients. Thus, not only is an attorney precluded from working on any other case for the hours which he devotes to employment litigation, he or she may also be alienating considerable business interests in the community and thus be permanently deprived of employment from those sources which provide the bulk of many attorneys' livelihoods. To assume that private counsel will undertake such a risk for the possibility of a below-minimum scale attorney's fee is unrealistic.

Successful representation in employment litigation demands not only time which could be devoted to other work, but also considerable creativity on

⁶ Walker, *Title VII: Complaint and Enforcement Procedures and Relief and Remedies*, 7 B.C. Ind. & Com. L. Rev. 495, 505-06 (1966).

the part of counsel. As this Court remarked in the appellate opinion in the case at bar, "This appeal and cross-appeal present important unsettled questions concerning the proper interpretation of Title VII of the Civil Rights Act of 1964 . . ." 408 F. 2d 228, 229 (5th Cir. 1969). A reasonable attorney's fee must cause the private bar to prefer employment discrimination litigation over areas where the demands on the legal creativity of counsel are less extensive.⁷ However, the award in the case below is calculated to make this area of endeavor as unattractive as possible.

Not only will the grossly inadequate attorney's fee discourage private counsel from undertaking employment discrimination cases, but it will actually encourage continued discrimination. Potential defendants are put on notice, not that it will be costly for them to initiate or continue employment discrimination, but that, for a very nominal cost, in terms of attorney's fees likely to be granted plaintiffs, they may not only continue discrimination, but force the victims of that discrimination to engage in lengthy and complex litigation to secure their rights.

C. Fees should be awarded in accordance with the adequate counsel for the public interest plan.—By every standard set forth in Canon 12, American Bar Association Canons of Professional Ethics, and by any other measure which this Court could consider, MS. ROBERTS' prayer for attorney's fees was modest. The arguments which could be advanced in support of that requested fee have been set forth at length for this court in the briefs before it. There can be no basis for this court denying such an award.

However, it is the position of this brief that even the award sought is insufficient to promote the purposes of the Civil Rights Act of 1964, including Title VII. The Western Region, NAACP, the Mexican-American Legal Defense and Educational Fund, Inc., and the United Native Americans, Inc., urge that this Court set attorney's fees in accordance with the following formula:

The minimum attorney's fee, in this and in other litigation in the public interests should be calculated by multiplying the number of hours expended on the case by *twice* the hourly fee prevailing in the geographic area.⁸

The lawyer in public interest cases, such as those brought under Title VII, receives a fee award only if the litigation is successful. If the case is lost, the attorney will go uncompensated. There is thus only a fifty percent (50%) chance of financial reward in such cases. The contingency factor in litigation has long been recognized in other areas as a basis for increasing the rate of compensation set by a court in its award of attorney's fees.⁹ The contingent nature of any attorney's fees in public interest cases must be recognized and dealt with in a manner consistent with the policy of encouraging private litigation in these fields.

A rational, objective and definitive method for taking account of the 50% contingency factor is to double the usual hourly fee. Such a practice would substantially lessen the financial obstacle facing the private bar in public interest litigation. It sets a minimum for the award of attorney's fees and can be uniformly applied. Defendants would also be put on notice of the minimum cost they will face in litigation. Violations of the statute will thus be deterred and settlement encouraged.

Doubling the hourly fee requested from the District Court, \$40, and multiplying this amount by the hours expended on this case would result in an award of \$46,800 in attorney's fees. The Western Region, NAACP, the Mexican-American Legal Defense and Educational Fund, Inc., and the United Native Americans, Inc., urge that such an award is reasonable and totally appropriate.

The award of attorney's fees at the proposed rate of compensation is neither extraordinary nor unprecedented. In a recent Title VII case, which

⁷ For instance, in a case where the court noted that, "Considering the final factor of the skill demanded, 'Slip and Fall' Jones Act cases are among the simplest of all cases," it was determined that \$60.00 an hour was proper for all attorney's services in such a case. *Paolillo v. American Export Isbrandtsen Lines, Inc.*, 305 F. Supp. 250 (S.D. N.Y. 1969).

⁸ The Court has before it evidence of this fee. See the references contained in footnote 5, *supra*.

⁹ See, e.g., *Harris v. Chicago Great W. Ry.*, 197 F.2d 829, 836 (7th Cir. 1952); *Silver v. Rosenberg*, 139 F.2d 1020, 1021 (2d. Cir. 1944); Hornstein, *Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards*, 69 Harv. L. Rev. 658 (1956).

relied heavily on the decision in the *Weeks* case, a California district court awarded attorney's fees amounting to over \$70 an hour.¹⁰

Nor would adoption of the proposed Adequate Counsel for the Public Interest Plan destroy the discretion of a court considering a request for attorney's fees. The standard set forth herein could be modified in any given case. However, the burden would be on the defendant to present justification for such a modification, for instance, that the legal issues in the case were well-settled and that the factual issues were clear. In other cases, such as the one at bar, the formula should define the minimum reasonable attorney's fee award, with upward adjustments as the Court deems appropriate.

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court set the attorney's fee for SYLVIA ROBERTS, in accordance with the Adequate Counsel for the Public Interest Plan set forth herein, at \$46,800. In the alternative, this Court should set the attorney's fee for SYLVIA ROBERTS in accordance with her request as submitted to the District Court.

Respectfully submitted,

JO ANN CHANDLER, Esq.
*Attorney for the Western Region, NAACP,
 and the United Native Americans, Inc.,
 Amicus Curiae.*

ALAN EXELROD, Esq.
 MARIO OBLEDO, Esq.
*Attorneys for the Mexican-American Legal Defense
 and Educational Fund, Inc.,
 Amicus Curiae.*

DECLARATION OF MAILING

I, the undersigned, say: I am, and was at all times herein mentioned, a citizen of the United States, County of San Francisco, State of California, over the age of 18 years and not a party to the within action or proceeding; that my business address is 433 Turk Street, San Francisco, California 94102; that on the date set forth below, I enclosed two true copies of the attached Brief Amicus Curiae in a separate envelope for each of the persons named below, addressed as set forth immediately below the respective names, as follows:

David J. Heinsma, Esq.,
 2900 First National Bank Building,
 Atlanta, Ga. 30303.

Vincent L. Sgrosso, Esq.,
 1245 Hurt Building,
 Atlanta, Ga. 30303.

Sylvia Roberts, Esq.,
 Post Office Box 3081,
 Baton Rouge, La. 70821.

Each said envelope was sealed and with postage thereon fully prepaid as first-class mail; I deposited the same on the date set forth below, in a mailing facility regularly maintained by the United States Post Office Department for the mailing of letters.

I declare under penalty of perjury that the foregoing is true and correct.
 Executed on February 10, 1972, at San Francisco, California.

HELEN CHODACK, *Declarant.*

¹⁰ *Rosenfeld v. Southern Pacific Company*, Civ. No. 67-1377-F, Findings Of Fact and Conclusions of Law Re: Attorney's Fees, C.D. Cal., Dec. 2, 1971.

U.S. Court of Appeals for the Fifth Circuit

No. —

MRS. LORENA W. WEEKS, PLAINTIFF,

v.

SOUTHERN BELL TELEPHONE & TELEGRAPH CO., DEFENDANT.

BRIEF AMICUS CURIAE ON BEHALF OF WOMEN'S EQUITY ACTION LEAGUE IN SUPPORT
OF THE APPEAL FROM THE DISTRICT COURT ORDER AWARDING COUNSEL FEES

Argument

In awarding counsel fees in this action, the District Court is in accord with the vast majority of court decisions under Title VII of the Civil Rights Act of 1964; 42 U.S.C., Sec. 2000e et seq., in which attorney's fees have been awarded to prevailing plaintiffs as a matter of course under Sec. 2000e-5(k) [Sec. 706(k)]. *Robinson v. Lorillard Corp.*, 444 F. 2d 791 (4th Cir. 1971), reversing in part 319 F. Supp. 835 (M.D.N.C. 1970); *Lea v. Cone Mills Corp.*, 438 F. 2d 86 (4th Cir. 1971), reversing in part 301 F. Supp. 97 (M.D.N.C. 1969); *Kober v. Westinghouse Electric Corp.*, 325 F. Supp. 467 (W.D. Pa. 1971); *Local 246, Utility Workers Union of America, AFL-CIO, v. Southern California Edison Co.*, 320 F. Supp. 1262 (C.D. Calif. 1970); *Rosen v. Public Service Electric and Gas Co.*, 328 F. Supp. 454 (D.C. N.J. 1970); *Clark v. American Marine Corp.*, 320 F. Supp. 709 (E.D. La. 1970), aff'd. 437 F. 2d 959 (5th Cir. 1971); *Cheatwood v. South Central Bell Telephone and Telegraph Co.*, 303 F. Supp. 754 (M.D. Ala. 1969); *Richards v. Griffith Rubber Mills*, 300 F. Supp. 338 (D.C. Ore. 1969); *Dewey v. Reynolds Metals*, 300 F. Supp. 709 (W.D. Mich. 1969); *U.S. by Clark v. Local 189, United Papermakers and Paperworkers, AFL-CIO*, 301 F. Supp. 906 (E.D. La. 1969); *Dobbins v. Local 212, IBEW*, 292 F. Supp. 413 (S.D. Ohio 1968); *Quarles v. Phillip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968); *Boice v. Colgate-Palmolive Co.*, 272 F. Supp. 332 (S.D. Ind. 1967), reversed in part on other grounds 416 F. 2d 711 (7th Cir. 1969).

What is at issue in this appeal, therefore, is not the absence of an award of attorney's fees but the amount that was awarded to plaintiff for the services of Sylvia Roberts, the attorney who represented the plaintiff for a period of more than three years during the appeal, the proceedings on remand, and other post-appeal matters.

Canon 12 of the American Bar Association Canons of Professional Ethics sets forth the guidelines to be considered in determining the amount of the fee, which include in relevant part: (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will mean the loss of other employment; (3) the customary charges of the Bar for similar services; (4) the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. Canon 2-106 of the A.B.A. Code of Professional Responsibility, adopted in August 1969, sets forth similar guidelines with the additional factor of the experience, reputation, and ability of the lawyer performing the services.

The District Court Order Awarding Counsel Fees discusses the time spent by Mrs. Roberts on the case, the testimony of other attorneys in the geographic area giving their opinions as to a reasonable fee for the appeal and a reasonable hourly charge for time spent, the benefits to the plaintiff as a result of the case, the difficulty of the appeal and the subsequent efforts on remand, and the contingent-fee aspect of the statute. In concluding, the Court stated that no one factor is controlling, that the Court has broad discretion in setting counsel fees and the right to employ its own expertise on the matter. Mrs. Roberts was awarded an attorney's fee of \$15,000 to-

gether with the expenses claimed, an amount substantially less than the amount submitted by Mrs. Roberts as a reasonable fee for her services in this case; hence this appeal.

The Women's Equity Action League as Amicus Curiae supports Mrs. Roberts in her request for a fee that includes compensation of \$40.00 an hour for her time spent on the case and also includes a fixed fee of at least \$6,000 for the result obtained on the appeal in obtaining a complete reversal and in establishing an interpretation of a new and difficult statute. The out-of-pocket expenses claimed were not contested below and were granted; that amount, therefore, is not in issue on the appeal.

The American Bar Association guidelines not mentioned specifically by the District Court in setting the fee were the novelty of the questions involved in the case, the benefit to other women in employment or potential employment all over the country, the important public interest served as a result of the decision in the case, and the experience and skill of the lawyer performing the services. It can only be assumed from the absence of any mention of these factors that the Court did not consider them in setting the fee or did not attribute to them the importance which they deserve in this case.

In regard to the contingency or certainty of the compensation, the Court stated that because the fee under the statute is awarded only to the prevailing party, "the fee has some of the attributes of a contingent fee arrangement," which seems to imply that some consideration was given to the contingency aspect but not as much as is customary in contingent-fee arrangements.

We submit that the District Court did not consider the above factors properly in determining the attorney's fee for Mrs. Roberts and that this Court should set the fee in accordance with Mrs. Roberts' request. Appellate courts are themselves experts as to the reasonableness of attorney fees, and may, in the interest of justice, fix fees of counsel, albeit in disagreement on the evidence with the views of the trial court. *Columbian Nat. Life Ins. Co. v. Keyes*, 138 F. 2d 382 (8th Cir. 1943), cert. den. 321 U.S. 765, 64 S. Ct. 521, 88 L. Ed. 1061, and *Columbian Nat. Life Ins. Co. v. Marguerite Keyes, Inc.*, 321 U.S. 765, 64 S. Ct. 521, 88 L. Ed. 1061; *First Nat. Bank of Fort Worth v. U.S.*, 301 F. Supp. 667 (N.D. Tex. 1969).

Considering first the novelty of the questions involved in the case and the fact that it was a case of first impression, the importance of the Fifth Circuit decision is not the overturning of a state weight-lifting restriction (the restriction was in fact rescinded by administrative agency action during the progress of the case) but the construction given by the Court to the bona fide occupational qualification exemption in the statute, 42 U.S.C., Sec. 2000e-2(e)(1) [Sec. 703(e)]. The Court began its Opinion by stating that "This appeal and cross-appeal present important unsettled questions concerning the proper interpretation of Title VII of the Civil Rights Act of 1964 . . ." 408 F. 2d 228, 229 (5th Cir. 1969). By holding that the bona fide occupational qualification exemption is to be narrowly construed and by rejecting defendant's stereotyped labelling of the job in question as "strenuous," the effect of the decision was to prevent a construction of the statute which would have wiped out practically all the benefits intended for women in employment under Title VII. The Fifth Circuit decision in this case was the first Court decision thus to hold, and the legal issues presented in the litigation constituted pioneer territory to the lawyers representing the plaintiff and a doubly difficult task for the lawyer prosecuting the appeal when the case had been lost on the trial. In all fairness to the Court below, the Court's Order does refer to the "extent of the difficulty of the appeal" as a factor considered. There is no mention, however, of the unsettled state of the law in a case of first impression, as was this case.

Nor does the Court below discuss the significance of the result obtained in this case. The result of the decision benefited not only the plaintiff in awarding her complete recovery on all of the remedies she had sought, but also benefited other women employees at Southern Bell who thereby were eligible for jobs in the classification from which they and plaintiff had previously been excluded. See Exhibits B, C, and D attached to Affidavit of Sylvia Roberts Relative to Reasonable Attorney Fees. Although plaintiff's action was not a class suit, the decision is obviously of value to women em-

ployees or potential employees all over the country against whom employers might attempt to raise a bona fide occupational qualification defense based on the class stereotypes knocked down by the Fifth Circuit in this case. The decision consequently serves the important public interest against sex discrimination in employment, which is one of the purposes of Title VII.

Sex discrimination and race discrimination in employment are equally important, and women are entitled to the statute's protections against discrimination in the same manner as are racial groups. The Third Circuit, for example, has stated: "We do not make the distinction . . . that discrimination on account of sex is any less reprehensible or any less protected than discrimination because of race." *Rosen v. Public Service Electric & Gas Co.*, 409 F. 2d 775 (3d Cir. 1969). In *Local 186, International Pulp, Sulfitc & Paper Mill Workers v. Minnesota Mining & Manufacturing Co.*, 304 F. Supp. 1284, 1287, 1289 (N.D. Ind. 1969), the Court declared that it "does not and will not draw any legal distinctions between the seriousness and gravamen of acts and policies of sexual discrimination alleged herein and the more frequently litigated acts of racial discrimination."

* * * * *

. . . [T]his court cannot conclude that under the allegations herein presented, sexual discrimination differs in any significant way from racial discrimination as a form of class discrimination."

As the Supreme Court stated with reference to Title II of the Civil Rights Act of 1964, when a plaintiff obtains an injunction under Title II,

" . . . he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401–2 (1968).

Similarly, where Title VII plaintiffs seek and obtain injunctive relief, they are acting as agents of the national policy that seeks to eliminate racial, sex, and other discrimination in employment. *Clark v. American Marine Corp.*, 320 F. Supp. 709 (E.D. La. 1970); *Boue v. Colgate-Palmolive Co.*, 416 F. 2d 711 (7th Cir. 1969).

Remedies under Title VII may include, as they did in this case, back pay to the plaintiff as well as injunctive relief. Sec. 706(g). Monetary recovery in a court action is not decisive, however, in determining the amount of attorney's fees to be awarded, and a fee is often payable when the benefit cannot be translated into dollar terms. *Freeman v. Ryan*, 408 F. 2d 1204 (D.C. Cir. 1968); *Ratner v. Bakery and Confectionery Workers Int. Union*, 354 F. 2d 504 (D.C. Cir. 1965). The amount of recovery in a case may be small, but the legal principles established by counsel for the plaintiff may be extremely important. A fee based on the monetary amount of recovery may be an insufficient award for counsel's services, therefore, because it ignores the legal principles and the complexity of the work involved. *Trans World Airlines, Inc. v. Hughes*, 312 F. Supp. 478 (S.D. N.Y. 1970); *Osborn v. Sinclair Refining Co.*, 207 F. Supp. 856 (D.C. Md. 1962); *U.S. ex rel. Sherman v. Carter*, 301 F. 2d 467 (9th Cir. 1962).

The Record before the Court on the issue of the attorney's fee properly payable to Mrs. Roberts contains references to other cases as evidence of the impact of the *Weeks* decision on development of the law under Title VII and also on the interpretation of other legislation, both federal and state, including the Federal Equal Pay statute and New York Executive Law, Sec. 296. The effect of the "Weeks test" is also discussed in 84 Harv. L. Rev. 1109, 1179–1181 (1971).

Another American Bar Association guideline in setting fees which was not mentioned in the Court's Order is comprised of the skill and experience of the attorney who has performed the services. This, of course, is a speculative area to some extent and should not be an area where subjective judgments are allowed to be controlling. Affidavits in the Record from Sylvia Roberts and other members of the Louisiana Bar, including the Affidavit of

the Immediate Past President of the Louisiana Bar Association, all attest to Mrs. Roberts' extensive legal experience and good standing at the Bar.

In *Clark v. American Marine Corp.*, 320 F. Supp. 709 (E.D. La. 1970), aff'd, 437 F. 2d 959 (5th Cir. 1971), a Title VII suit based on race discrimination, plaintiffs were represented by multiple counsel who jointly spent over 580 hours in preparing the case for trial and trying it, resulting in injunctive relief. The Court awarded plaintiffs' counsel a reasonable fee of \$20,000, referring to the time spent, the fact that the suit involved interpretation of a new and different statute, and the skill of plaintiffs' lead counsel. The number of hours Mrs. Roberts spent on the *Weeks* case and that spent by multiple counsel in the *Clark* case is almost the same; Mrs. Roberts' time on the *Weeks* case totalled 585 hours. As in *Clark*, *Weeks* involved interpretation of a new and difficult statute. The Federal courts have recognized, as discussed above, that race discrimination and sex discrimination are equally serious and are entitled to the same protection of the statute. Surely a subjective judgment as to the relative abilities of plaintiffs' attorneys in the two cases was not the controlling factor which resulted in a substantially higher award of attorney's fees in *Clark* than in *Weeks*.

Since the Court Order Awarding Counsel Fees does not mention counsel's experience, ability, and standing at the Bar, we can only assume and the evidence presented as to Mrs. Roberts' legal training, experience, and ability. Lead counsel in the *Clark* case, praised so graciously by the District Court Judge, had been admitted to the Bar less than half the number of years that Mrs. Roberts had been a member of the Bar, during which time she had had extensive trial and appellate experience.

The Affidavits in the Record of Louisiana and Georgia lawyers indicate that \$40.00 an hour would be a reasonable fee for Mrs. Roberts' services in the *Weeks* case. The minimum hourly fee in Georgia under a 1964 fee schedule is \$35.00. The Louisiana fee under a 1963 schedule is \$30.00; and in Baton Rouge, the fee is \$35.00 an hour for routine matters. (Affidavit of Jerry H. Bankston). The fee schedule established in Texas in 1968 is \$40.00 an hour. (Affidavit of George B. Hall). The minimum fee schedule of the Louisiana State Bar Association states that the minimum hourly rate should be increased to reflect superior achievement, unusual responsibility, or any other factors which justify a higher charge. (Affidavit of George B. Hall).

The Court's award of \$15,000 counsel fee to Mrs. Roberts amounts to approximately \$25.00 an hour for her services, grossly less than the hourly fee considered currently reasonable by other practitioners and that set by up-to-date minimum fee schedules of State Bar Associations. There is no reason to doubt the accuracy of Mrs. Roberts' time record, submitted by sworn Affidavit, and this Court is cognizant, of course, as was the Court in *State of Iowa v. Union Asphalt & Roadoils, Inc.*, 281 F. Supp. 391 (S.D. Iowa 1968), that

"... only a percentage of the research and investigation conducted by attorneys blossom into valuable weapons for use in the arena of legal battle and that the extent of this work can never be ascertained with certainty, even at the conclusion of a case. (281 F. Supp. 391, 400).

In regard to the contingent-fee attributes of a fee awarded by statute to the prevailing party, the Court below apparently did not determine the fee according to the standard of what plaintiff would have had to pay her attorney on a contingent-fee basis. It is well established that successful counsel retained on a contingent-fee basis is entitled to a higher fee than if he or she had conducted the litigation for a fixed amount of compensation. *Sincock v. Obara*, 320 F. Supp. 1098 (D.C. Del. 1970). In *Hutchinson v. William C. Barry, Inc.*, 50 F. Supp. 292 (D.C. Mass. 1943), a case brought under the Fair Labor Standards Act, the Court rejected defendant's argument that plaintiff is not entitled to recover as large an attorney's fee as would be allowed if the attorney sued his client for the fee. The Court stated:

"The spirit of the law is that the plaintiff gets as part of his recovery, if he wins, his whole reasonable counsel fees, not some fraction of them. This is so that he will not ordinarily be required to pay anything more to his lawyer.

* * * * *

I therefore determine the fee exactly as I would were the plaintiff sued by his counsel for a fee. Relevant and familiar criteria are set

forth in the Twelfth Canon of the American Bar Association.” (50 F. Supp. 292, 298).

In a private antitrust suit, *Cape Cod Food Products, Inc. v. National Cranberry Ass'n.*, 119 F. Supp. 242 (D.C. Mass. 1954), the Court elaborated on its conclusion in *Hutchinson* as follows:

“ . . . a losing defendant must pay what it would be reasonable for counsel to charge a victorious plaintiff. The rate is the free market price, the figure which a willing, successful client would pay a willing, successful lawyer. Sometimes the figure may seem high. But so far as price is determined by unique excellence and by social usefulness, the advocate is especially worthy of large recompense. His brevity may reflect extraordinary gifts and thus in itself be indicative of merit. . . . And his simplicity of presentation may be a proof not of the problem's lack of difficulty, but rather of his unmatched native quality.

* * * * *

Unless excellence in the trial lawyer is properly recompensed, the best men [i.e., persons] will not spend their time in court, and thus there will dry up the most essential sources of an independent bar.” (119 F. Supp. 242, 244).

The standard of free market price for court awards of counsel fees adopted by the Court in *Hutchinson* and *Cape Cod Food Products* has been followed in *Union Leader Corp. v. Newspapers of New England, Inc.*, 218 F. Supp. 490 (D.C. Mass. 1963), and *Farmington Dowel Products Co. v. Forster Mfg. Co., Inc.*, 297 F. Supp. 924 (S.D. Maine 1969, both private antitrust suits.

The fact that the statutes involved in those cases provide for an award of attorney's fees to a prevailing plaintiff does not rule out the application of the same standard to victorious plaintiffs in Title VII cases, even though Sec. 706(k) provides that counsel fees may be awarded to the prevailing party. As discussed above, the plaintiff in a Title VII case is acting as an agent of the national policy against discrimination, in effect as a “private attorney general” in the public interest. The policy reasons for allowing liberal attorney's fees to victorious plaintiffs do not apply, therefore, to successful defendants. As one commentator has described the system of private individual enforcement of Title VII:

“The system of individual enforcement was the result of a conscious, explicit rejection of a system of administrative enforcement, and liberal awards of attorney's fees to successful complainants are necessary if the system is to work as intended.

* * * * *

The statute's provision for awards of attorney's fees to the prevailing “party” does not mean they should be made to prevailing respondents as liberally as to prevailing claimants. . . . Statements in the legislative history directly support the argument that it is the claimant who is to be benefited by the attorney's fee provisions.[*] Awards to respondents should be limited to unusual situations, such as defense against clearly fraudulent claims.”¹

In *Clark v. American Marine Corp.*, *supra*, the Court in awarding a fee of \$20,000 stated: “I don't think that the plaintiffs could hire a lawyer of equal skill on a contingent basis in New Orleans to do the job for less.” (320 F. Supp. 709, 712) (Emphasis added)

The policy reasons for following the standard of what would be reasonable for counsel to charge a victorious plaintiff in setting counsel fees in Title VII cases are not only to enable plaintiffs of limited means to obtain the legal competence and experience necessary to conduct complex litigation such as Title VII cases, but also to deter would-be discriminators from future violations of the provisions of Title VII.

In accord with the principle of statutory construction that humanitarian, remedial statutes are to be liberally construed, the courts have given a liberal construction to procedural issues under Title VII in order to effectuate the purposes and spirit of the statute.² For the same reasons, Sec. 706(k) should

* 110 Cong. Rec. 12,724 (1964).

¹ Walker, *Title VII: Complaint and Enforcement Procedures and Relief and Remedies*, 7 B.C. Ind. & Com. L. Rev. 495, 505-6 (1966).

² See cases cited in Equal Employment Opportunity Commission, *Fifth Annual Report* (1969-70), pp. 18-19.

receive the liberal construction accorded to the other procedural provisions of Title VII.

Conclusion

For the foregoing reasons, we respectfully submit that this Court set the attorney's fee for Sylvia Roberts in accordance with her request so that the fee would include compensation of \$40.00 an hour for her time spent on the case and also a fixed fee of at least \$6,000 for the result on appeal in obtaining a complete reversal and in establishing an interpretation of a new and difficult statute in a case of first impression.

Respectfully submitted.

RUTH M. FERRELL,
Attorney for Women's Equity,
Action League, Amicus Curiae.

U.S. Court of Appeals, Fifth Circuit.

Mrs. LORENA W. WEEKS, PLAINTIFF V. SOUTHERN BELL TELEPHONE & TELEGRAPH CO., DEFENDANT-APPELLEE, SYLVIA ROBERTS, COUNSEL FOR LORENA W. WEEKS, APPELLANT.

No. 72-1075.

Rehearing and Rehearing En Banc Denied Jan. 11, 1973.

Appeal from order of the United States District Court for the Southern District of Georgia, at Swainsboro, Griffin B. Bell, J., awarding a fee of \$15,000 to attorney for services rendered in civil rights case. The Court of Appeals held that award of \$15,000 fees for attorney, who did not try civil rights case but entered it after notice of appeal had been filed, did not constitute abuse of discretion, notwithstanding attorney's claim that she spent 585 hours on case.

Affirmed.

Wisdom, Circuit Judge, dissented and filed opinion.

1. Attorney and Client—140; Courts—406.5(20)

Determination of a reasonable attorney's fee is left to sound discretion of trial judge, and an attorney's fee award of a trial judge should not be set aside unless there has been a clear abuse of his discretion.

2. Civil Rights—13.17

Test of reasonableness of an attorney's fee award in a civil rights action is whether trial judge acted within sound judicial discretion. Civil Rights Act of 1964, §§ 703(a), 706(g, k), 42 U.S.C.A. Secs. 2000e-2(a), 2000e-5(g, k).

3. Civil Rights—13.17

Civil Rights Act provision, which states that the court in its discretion may allow a reasonable attorney's fee, is not mandatory nor does it imply requirement of any formula. Civil Rights Act of 1964, § 706(k), 42 U.S.C.A. § 2000e-5(k).

4. Civil Rights—13.17

Hours claimed or spent on a civil rights case is not the sole basis for determining attorney's fees. Civil Rights Act of 1964, §§ 703(a), 706(g, k), 42 U.S.C.A. §§ 2000e-2(a), 2000e-5(g, k).

5. Civil Rights—13.17

Award of \$15,000 fees for attorney, who did not try civil rights case but entered it after notice of appeal had been filed, did not constitute abuse of discretion, notwithstanding attorney's claim that she spent 585 hours on case. Civil Rights Act of 1964, §§ 703(a), 706(g, k), 42 U.S.C.A. Secs. 2000e-2(a), 2000e-5(g, k).

Sylvia Roberts, Baton Rouge, La., pro se.

Jo Ann L. Chandler, San Francisco, Cal., for Public Advocates, Inc., amicus curiae.

Ruth M. Ferrell, Wilmington, Del., for Women's Equity Action League, amicus curiae.

Phineas Indritz, Acting Gen. Counsel, Marguerite Rawalt, Counsel, Arlington, Va., for NOW Legal Defense and Education Fund, Inc., amicus curiae.

Mario Obleda, Alan B. Exelrod, San Francisco, Cal., for Mexican-American Legal Defense and Educational Fund, Inc., amicus curiae.

Nathaniel R. Jones, Gen. Counsel, NAACP, New York City, Paul J. Spiegelman, Russell Specter, James A. Beat, Washington, D.C., for NAACP, amicus curiae.

David J. Heinsma, Vincent L. Sgrossso, Atlanta, Ga., for defendant-appellee.

Before WISDOM and THORNBERRY, Circuit Judges, and SMITH, District Judge.

Per Curiam:

In this appeal Mrs. Sylvia Roberts asks that the attorney's fees allowed her by the district court in the amount of \$15,000 be increased to \$46,800

for her successful representation of the plaintiff-appellant in *Weeks v. Southern Bell Telephone and Telegraph Co.*, (5th Cir. 1969), 408 F. 228. A majority of this Court holds that the district court acted well within its judicial discretion in awarding a fee of \$15,000 to Mrs. Roberts.

Weeks was a Title VII case. Lorena Weeks was employed by the Southern Bell Telephone Company in Savannah, Georgia. In April 1966 she bid on the job of switchman. For the most part, that job involves turning on and off electric switches—but occasionally a switchman lifts weights in excess of thirty pounds. At that time, Georgia and many other states had “protective legislation” prohibiting the employment of women in occupations requiring the lifting of weights of over thirty pounds. Section 703(e)(1), 42 U.S.C. 2000e-2(e)(1) provides that refusal to employ women “shall not be an unlawful employment practice . . . where . . . sex . . . is a *bona fide occupational qualification*.” Relying on this provision, Southern Bell returned Mrs. Week’s bid in a letter stating that the company had “decided not to assign women to this location on a switchman’s job.”¹

Mrs. Weeks, through a court-appointed attorney, William B. Clark, sued the defendant, charging a violation of Title VII. The district court decided in favor of Southern Bell. Mr. Clark withdrew from the case. Mrs. Weeks then retained Mrs. Sylvia Roberts, a Baton Rouge lawyer experienced in the civil rights field. On appeal, the Court decided that Southern Bell had “not satisfied the burden of proving that the job of switchman is within the bona fide occupational qualification exception . . .” to 42 U.S.C. § 2000e-2(a). The Court reversed on that issue and remanded the case “for determination of appropriate relief under the provisions of 42 U.S.C. § 2000e-5(g).”

On remand, Judge Alexander A. Lawrence conducted a hearing to determine the appropriate relief. At that time Mrs. Roberts requested a fee of forty dollars an hour plus expenses, totalling \$19,430.42. In addition, she requested \$6,000 on the ground that the case was one of first impression. Some months later Judge Lawrence excused himself. Mrs. Roberts then wrote to Chief Judge John R. Brown, requesting that another judge be designated to try the case on remand. Judge Brown designated the Honorable Griffin B. Bell of this Court to hear the case.

Judge Bell held a pre-trial conference and two other conferences, and a full hearing on the issue of attorney’s fees. Partly as a result of those conferences Mrs. Weeks was given the job of switchman as of the date of her application and the parties entered into a consent decree awarding Mrs. Weeks the full amount of her claim.²

[1, 2] The determination of a reasonable attorney’s fee is left to the sound discretion of the trial judge. *Electronics Capital Corp. v. Sheperd*, 439 F. 2d 692, (5th Cir. 1971); *B-M-G Investment Co. v. Continental Moss Gordin, Inc.* 437 F. 2d 892 (5th Cir. 1971); *Connecticut Importing Co. v. Frankfort Distilleries*, 101 F. 2d 79 (2d Cir. 1939); *Campbell v. Green*, 112 F. 2d 143 (5th Cir. 1940). An been a clear abuse of his discretion. *Hoffman v. Aetna Life Ins. Co.*, 411 F. 2d 49 (5th Cir. 1966); *Calhoun v. Hertwig*, 363 F. 2d 257 (5th Cir. 1966) cert. denied, 386 U.S. 966, 87 S.Ct. 1047, 1047, 18 L.Ed.2d 116; *In Re Long Island Properties*, 150 F. 2d 313 (5th Cir. 1971). These principles apply in Title VII cases. In *Culpepper v. Reynolds Metals Co.*, 442 F. 2d 1078 (5th Cir. 1971), for example, this Court affirmed an attorney’s fee award of \$1500, stating:

“ . . . Determination of the reasonableness of attorney’s fees is a matter which is left to the sound discretion of the trial judge. *Electronics Capital Corp. v. Sheperd*, 439 F. 2d 692 (5th Cir. 1971), and cases cited. It cannot be said that this award constituted a clear abuse of discretion. . . .” *Id.* at 1081. Thus, it can be seen that the test of the reasonableness of an attorney’s fee award in a Title VII case, as in others, is whether the trial judge acted within sound judicial discretion.

[3] Section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) states that “the court, in its discretion, may allow . . . a reasonable attorney’s

¹ Rule 59, promulgated by the Georgia Commission of Labor in accordance with Section 54-122(d) of the Georgia Code prohibited the employment of women in occupations requiring that they lift weights in excess of 30 pounds. The Court did have to consider the reasonableness or the constitutionality of this regulation; while the case was pending on appeal the Georgia Commissioner of Labor repealed Rule 59.

² Mrs. Weeks recovered \$30,761.68 as back pay. This included all the overtime earned by the incumbent, all premium pay, evening and night differentials, travel pay, expenses, and interest.

fee". (Emphasis added.) The language is not mandatory nor does it imply the requirement of any formula. It is evident to the majority from Judge Bell's careful opinion as well as from the briefs and the record, that he did not abuse his authority in awarding fees of \$16,200: \$15,000 to Mrs. Roberts, \$1,200 to William B. Clark, trial counsel for Mrs. Weeks in the district court.

Judge Bell reviewed the many factors that are properly taken into consideration in determining a reasonable attorney's fee and applied his own knowledge, experience, and expertise to determine the dollar amount to be awarded both trial and appellate counsel. See *Campbell v. Green*, 112 F. 2d 143 (5th Cir. 1940), where we stated:

"... The court . . . is itself an expert on the question and may consider its own knowledge and experience concerning reasonable and proper fees and may form an independent judgment either with or without the aid of testimony of witnesses as to value." *Id.* at 144.

A review of the specific facts before Judge Bell further supports his award. Mrs. Roberts did not try the case but entered it after the notice of appeal had been filed. Neither her work product, as filed with the Fifth Circuit in *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F. 2d 228 (5th Cir. 1969), nor the record on appeal was lengthy. Despite this, Mrs. Roberts, in an affidavit filed February 10, 1970, contended that she spent 333¼ hours on the original appeal—262¼ on research and 71 hours in case management. Experienced counsel who reviewed the record and read the briefs as filed with this Court in the original appeal testified that the work product should have been accomplished in 50 to 100 hours.

[4] Later Mrs. Roberts asserted that she spent an additional 251¼ hours for a grand total of 585 hours. Hours claimed or spent on a case is not the sole basis for determining a fee. *Electronics Capital Corp. v. Sheperd*, 439 F. 2d 692, 693 (5th Cir. 1971). In any event the time factor, has a "dubious virtue . . . as a standard for legal services"; "when hours of time become a criterion, economy of time may cease to be a virtue." See Hornstein, *Legal Therapeutics: The "Salvage Factor in Counsel Fee Awards"*, 69 HARV.L.REV. 658 (1956).

Judge Bell thoroughly discussed the bases for his award of attorney's fees to Mrs. Roberts. He weighted the result obtained; the time expended by Mrs. Roberts both during and after the appeal; the expert testimony of Phyllis Kravitch and Julian F. Cornish, two Savannah attorneys; the affidavits of three Louisiana attorneys—George B. Hall of Alexandria, Edna Sakir of New Orleans, and Jerry H. Bankston of Baton Rouge; and the affidavit of J. R. Goldthwaite, Jr., of Atlanta. Additionally, Judge Bell considered the decision of Judge Rubin in *Clark v. American Marine Corporation*, 320 F.Supp. 709, E.D.La. 1970, aff'd per curiam 437 F.2d 959 (5th Cir. 1971), as well as the fact that "the settlement finally consummated was very favorable to plaintiff" He considered the briefs filed in the Fifth Circuit, the record, the difficulty of the appeal, the efforts on remand and the contingency of an attorney's fee award.

[5] Judge Bell was an experienced trial lawyer accustomed to the manifest difficulties inherent in fixing reasonable attorney's fees. He is an experienced, fair-minded, highly respected member of this Court. He was fully aware of the importance of the *Weeks* case. The question before this reviewing court is not what fee the members of this panel might have awarded sitting as a district court. The question is whether Judge Bell abused his discretion by awarding an unreasonably low fee. The majority answers firmly that Judge Bell did not abuse his discretion in making his award of \$15,000 fees to Mrs. Roberts.

The judgment is affirmed.

Wisdom, Circuit Judge (dissenting).

I respectfully dissent. With deference to Judge Bell and to the members of this panel, I feel that the attorney's fee allowed Mrs. Roberts does not reflect the difficulties she overcame nor the importance of the case in the cause of non-discrimination against working women.

Assuming the correctness of Mrs. Robert's estimate of the hours she spent on the case on appeal and on the merits when the case was remanded, she was paid at the rate of \$25 an hour. This compares with \$35 an hour prescribed by the Georgia minimum fee schedule, \$35 an hour by the Baton Rouge Bar Association, and \$40 an hour by the Texas Bar Association. These cases are for routine matters.

Weeks was as un-routine as a case could be. It had been lost below. Georgia labor regulations prohibited the employment of women in occupations requiring the lifting of weights in excess of 30 pounds. Although that regulation was repealed when *Weeks* was pending on appeal the adoption of the regulation in Georgia and other states was in itself evidence of the reasonableness of Southern Bell's decision not to employ women as switchmen. Moreover, in emergencies switchmen are subject to call at all hours. The pertinent language of Title VII is unclear, the relevant legislative history is sparse, and omnipresent is the centuries old tradition that men as men or as legislators should protect women from strenuous or dangerous tasks.

The case was one of first impression. A broad construction of the term "bona fide occupational qualification" could nullify Title VII. A holding that the burden of proof was on the employee would virtually nullify the Act. Mrs. Roberts succeeded in establishing a narrow construction of the exception. And this Court clearly held that the burden of proof is on the employer. 408 F.2d at 232.

When one sees the number of women employed in telephone companies in this country—one in six, we were told in oral argument—the far-reaching effect of *Weeks* is obvious to the eye. But the case is more important than its effect on the employment of women as switchmen. The principle it establishes is that women are individuals not a stereotyped class inferior to men when it comes to work performance. Today a woman may be an officer of the line in the United States Navy. She may be a police officer or United States Marshal. As Judge Frank Johnson said for this Court in *Weeks*:

"The promise of Title VII is that women are now to be on equal footing. We cannot conclude that by including the bona fide occupational qualification exception Congress intended to renege on that promise." 408 F.2d at 236. Moreover, *Weeks* cuts both ways: men may find doors open to them that previously were open only to women.

Mrs. Weeks ended her long litigation by fully recovering every dollar she claimed. The principal parties at interest, however, were the American public generally and working women particularly. In such litigation, as pointed out in *Robinson v. Lorillard Corp.*, 444 F.2d 791, 804 (4th Cir.).

"[U]nder Title VII, as under Title II of the Civil Rights Act of 1964, attorney's fees are to be imposed not only to penalize defendants for pursuing frivolous arguments, but to encourage individuals to vindicate the strongly expressed congressional policy against racial discrimination. The appropriate standard, therefore, is that expressed by the Supreme Court in *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968)" . . . 444 F.2d at 804.

in *Newman v. Piggie Park Enterprises*, (1968) 390 U.S. 400, 88 S.Ct. 464, 19 L. Ed.2d 1263 (1968), a case involving racial discrimination, the Court said:

"If [the plaintiff] obtains an injunction, he does so not for himself alone but also as a 'private attorney generally,' vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II." 390 U.S. at 402, 88 S.Ct. at 966. (footnotes omitted).

A number of organizations, recognizing this principle, have filed amicus briefs in behalf of Mrs. Roberts: The Western Region, NAACP; The Mexican-American Legal Defense and Educational Fund, Inc.; The United Native Americans, Inc.; NOW Legal Defense and Education Fund, Inc.; Women's Equity Action League; National Association for the Advancement of Colored People.

In sum, I feel compelled to take issue with the majority. I would reverse and remand the case for further consideration of the reasonableness of the attorney's fee due Mrs. Sylvia Roberts.

In the United States Court of Appeals for the Fifth Circuit

No. 72-1075

MRS. LORENA W. WEEKS, PLAINTIFF

v.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, DEFENDANT-APPELLEE,
SYLVIA ROBERTS, COUNCIL FOR LORENA W. WEEKS, APPELLANT

On Appeal from the United States District Court for the Southern District of
Georgia

PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC
OF SYLVIA ROBERTS, COUNSEL FOR
LORENA W. WEEKS, APPELLANT, AND
BRIEF IN SUPPORT

SYLVIA ROBERTS,
Baton Rouge, La.

INDEX

Petition for Rehearing and Petition for Rehearing En Banc
Certificate of Good Faith, Not for Delay
Brief in Support

I. The court erred in finding that the award did not constitute an abuse
of discretion which would seriously impair the implementation of Title
VII

II. The court erred in its finding of fact relative to the novelty, diffi-
culty of issues and results obtained

III. The court erred in its finding that the time spent by counsel
should be discounted as a factor on which a fee should be awarded

IV. Authorities cited by the court for the proposition that no abuse
of discretion was present are not apposite

Certificate of Service

TABLE OF AUTHORITIES

Austin v. Reynolds Metals Co., 326 F. Supp. 1145 (E.D. Va. 1970)
B-M-G Investment Co. v. Continental Moss Gordin, Inc., 437 F.2d (5th Cir.
1971)
Bowe v. Colgate Palmolive Co., 272 F. Supp. 332 S.D. Ind. 1967)
Calhoun v. Hertwig, 363 F.2d 257 (5th Cir. 1966)
Cape Cod Food Products v. National Cranberry Ass'n., 119 F. Supp. 242 (D.
Mass. 1954)
Cheatwood v. Southcentral Bell Tel & Tel. Co., 303 F. Supp. 754 (N.D. Ala.
1969)
Clark v. American Marine Corp., 320 F Supp 709 (E.D. La. 1970), *aff'd.*, 437
F.2d 959 (5th Cir. 1971)
Culpepper v. Reynolds Metals Co., 442 F.2d 1078 (5th Cir. 1971)
Diaz v. Pan Am. World Airways, 442 F.2d 385 (5th Cir. 1971)
Electronics Capital Corp. v. Sheperd, 439 F.2d 692 (5th Cir. 1971)
Hoffman v. Aetna Life Insur. Co., 411 F.2d 594 (5th Cir. 1969)
Massachusetts Mutual Life Insurance Company v. Brock, 405 F.2d 429 (5th Cir.
1968)
Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400
*New York State Division of Human Rights v. New York, Pennsylvania Pro-
fessional Baseball League*, 39 U.S.L.W. 2661
Peters v. Missouri Pac. Ry Co., 3 FEP Cases 793 (E.D. Tex. 1971)
Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971)
Rosen v. Public Service Electric & Gas Co., 328 F. Supp. 454 (D.N.J. 1971)

Rosenfeld v. Southern Pacific Ry. Co., 444 F.2d 1219 (9th Cir. 1971)
Rosenfeld v. Southern Pacific Ry Co., 4 FEP Cases 72 (C.D. Cal. 1971)
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Shultz v. Saxonburg Ceramics Inc., 314 F. Supp. 1262
Shultz v. Wheaton Glass Co., 421 F.2d 259 (3d Cir. 1970)
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Weeks v. Southern Bell Tell. & Tel. Co., 408 F.2d 228 (5th Cir. 1969)

SECONDARY AUTHORITIES

Annot., Amount of Attorneys Compensation, 56 ALR2d 13
Questions of Exclusions and Exceptions Under Title VII, 23 *Hastings L.J.* 55
 (1971)
Hornstein, Legal Therapeutics: The "Salvage Factor" in Counsel Fee Awards,
 69 *HARV. L.REV.* 658 (1956)

U.S. Court of Appeals for the Fifth Circuit

No. 72-1075

MRS. LORENA W. WEEKS, PLAINTIFF

v.

SOUTHERN BELL TELEPHONE & TELEGRAPH CO., DEFENDANT-APPELLEE, SYLVIA
ROBERTS, COUNSEL FOR LORENA W. WEEKS, APPELLANT.

On Appeal from the U.S. District Court for the Southern District of Georgia

PETITION FOR REHEARING AND PETITION FOR REHEARING EN
BANC OF SYLVIA ROBERTS, COUNSEL FOR LORENA W. WEEKS,
APPELLANT, AND BRIEF IN SUPPORT

In this appeal in which counsel seeks an increase of attorney fees, a *per curiam* opinion was entered affirming the judgment below, with a dissenting opinion by The Honorable John Minor Wisdom, Circuit Judge; Sylvia Roberts, counsel for Lorena W. Weeks, Appellant, respectfully petitions the Court for Rehearing and a Rehearing en Banc in this matter on the following grounds:

1. The Court erred in finding that the trial court's award of \$15,000.00 for 585 hours, or \$25.00 per hour, between one-third and one-fourth below the minimum hourly fee schedules for the states of Georgia, Louisiana and Texas, was not an abuse of discretion which would make it virtually impossible for a Title VII claimant to secure the services of a private attorney, and hence seriously impair the implementation of Title VII.

2. The Court erred in failing to give any consideration to attorney fees awarded in other Title VII cases in which the hourly fee of \$73.75 was awarded, *Rosenfeld v. Southern Pacific Company*, 4 FEP Cases 72 (C.D. Cal. 1971), and *Peters v. Missouri Pacific Ry. Co.*, 3 FEP Cases 793 (E.D. Tex. 1971) in which a fee in excess of \$80.00 per hour was awarded (\$44,000.00 for 483 hours).

3. The Court in accordance with the findings of the trial court erred in failing to find that this case was a difficult one of first impression interpreting Title VII which benefited all working women covered by Title VII, 42 U.S.C. Sec. 2000e (1) *et seq.* The Court thus failed to give any weight to the novelty, difficulty of the issues and results obtained, which are criteria for setting fees accepted by this Court in *Clark v. American Marine Corp.*, 320 F. Supp. 709 (E.D. La. 1970) *aff'd*, 437 959 (5th Cir. 1971)).

4. The Court erred in failing to find an abuse of discretion on the part of the trial judge as a result of a misapprehension of the facts regarding the novelty, difficulty of the issues and results obtained and application of an improper legal standard, warranting a reversal of the trial court under *Massachusetts Mutual Life Insurance Co. v. Brock*, 405 F.2d 429 (5th Cir. 1970).

5. The Court erred in finding that the number of hours consumed in the handling of this case should be discounted for the reason that "... the time factor, has a 'a dubious virtue . . . as a standard for legal services,' . . ." (Slip opinion, p. 6), which is contrary to *Clark v. American Marine Corp.*, *supra*, *Rosenfeld v. Southern Pacific Company*, *supra*, *Peters v. Missouri Pacific Ry. Co.*, *supra*, and other controlling cases, and is a conclusion not supported by the authorities cited therefor by this Court, to-wit, *Electronics Capital Corp. v. Sheperd*, 439 F.2d 692 (5th Cir. 1971), and Hornstein, *Legal Therapeutics: The "Salvage Factor" in Counsel Fee Awards*, 69 HARV. L. REV. 658 (Slip opinion, p. 6).

6. The Court erred in relying on testimony of "experienced counsel" with respect to the time in which the case could be handled since such counsel had never handled a Title VII case, did not know the question involved or the result obtained by counsel; and both witnesses spent a combined total of four and one-half hours in reading the record and briefs in arriving at

their conclusions, and testified that they did not examine counsel for appellant's time sheets, nor question her veracity regarding the hours spent on the case.

7. The Court erred in holding that the award below did not constitute an abuse of discretion based on the decisions of *Sulpepper v. Reynolds Metals Co.*, 442 F.2d 1078 (5th Cir. 1971); *Electronics Capital Corp. v. Sheperd*, 439 F.2d 692 (5th Cir. 1971); *B-M-G Investment Co. v. Continental Moss Gordin, Inc.*, 437 F.2d 892 (5th Cir. 1971); *Conncticut Importing Co. v. Frankfort Distilleries*, 101 F.2d 79 (2d Cir. 1939); *Campbell v. Green*, 112 F.2d 143 (5th Cir. 1940); *In re Long Island Properties*, 150 F.2d 313 (2d Cir. 1945); *Hoffman v. Aetna Life Inc. Co.*, 411 F.2d 594 (5th Cir. 1969); *Calhoun v. Hertwig*, 363 F.2d 257 (5th Cir. 1966) cert. denied 386 U.S. 966 (1966), which authorities do not support the Court's conclusion.

Wherefore, in view of the significance of the issues raised by this appeal, and the far reaching effect of the Court's decision on the access to the courts by litigants claiming denial of civil rights under Title VII, as well as other statutes, such as 42 U.S.C. Sections 1981, 1982 and 1983, Sylvia Roberts, Counsel for Lorena W. Weeks, Appellant, prays that the Court grant a rehearing and a rehearing en banc in this cause in support of which a short brief is hereunto attached.

SYLVIA ROBERTS.

I hereby certify that the foregoing Petition for Rehearing and Petition for Rehearing En Banc is presented in good faith, and not for delay.

SYLVIA ROBERTS.

In the United States Court of Appeals for the Fifth Circuit

No. 72-1075

MRS. LORENA W. WEEKS, PLAINTIFF

v.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, DEFENDANT-APPELLEE,
SYLVIA ROBERTS, COUNSEL FOR LORENA W. WEEKS, APPELLANT

On Appeal from the United States District Court for the Southern District of Georgia

BRIEF IN SUPPORT OF PETITION FOR REHEARING AND PETITION FOR REHEARING
EN BANC

I. THE COURT ERRED IN FINDING THAT THE AWARD OF THE TRIAL COURT DID NOT
CONSTITUTE AN ABUSE OF DISCRETION WHICH WOULD SERIOUSLY IMPAIR THE
IMPLEMENTATION OF TITLE VII

The *per curiam* opinion herein affirms the trial court's award of \$15,000.00 for 585 hours of labor covering a period in excess of three years, which is between one-third and one-fourth below the minimum hourly fee schedules for the states of Georgia, Louisiana, and Texas for *routine* matters. In so doing, the Court ignored the decisions in other relevant Title VII cases in which \$73.75 per hour was awarded, *Rosenfeld v. Southern Pacific Company*, 4 FEP Cases 72 (C.D. Cal. 1971), decision on other aspects of the case, 444 F.2d 1219 (9th Cir. 1971), and *Peters v. Missouri Pacific Ry. Co.*, 3 FEP Cases 793 (E.D. Tex. 1971). It is significant that *Peters* was not mentioned, although it was argued on the same day, May 9, 1972, before the same panel.

The award of adequate attorney fees has long been recognized as a matter of extreme importance as reflected in *Cape Cod Food Products v. National Cranberry Ass'n.*, 119 F.Supp. 242 (D. Mass. 1954), at p. 244.¹

"Unless excellence in the trial lawyer is properly recompensed, the best men will not spend their time in court, and thus there will dry up the most essential sources of an independent bar."

This statement applies with special force to the field of civil rights suits.² Congress was aware of the need for providing the means for vindication of civil rights deprivations, and expressly provided for attorney fees under the Civil Rights Act of 1964, as noted by the Supreme Court in *Newman v. Piggie Park Enterprises, Inc.*, 390 US 400 (1968), at p. 402:

"Congress therefore enacted the provision for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to be untenable, but more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II."

Newman has been held applicable to Title VII as well, *Clark v. American Marine Corp.*, *supra*; *Dobbins v. Local 212*, F. Supp. 413 (S.D. Ohio 1968).

Judge Wisdom, citing the *Newman* decision, also referred to the number of organizations which have filed *amicus* briefs in this case,³ and closed his opinion with these words:

¹ In this private anti-trust suit, counsel was granted \$35,000.00 for 597 hours.

² The *amicus curiae* brief filed herein on behalf of the National Association of Colored People observes that it is most difficult to obtain counsel for women, as well as blacks, pp. 8-10. In addition, appended to the brief in support of this petition for rehearing and petition for rehearing en banc by the Mexican-American Legal Defense and Educational Fund, Inc., and United Native Americans, is an affidavit executed by Oscar Williams, of the Equal Employment Opportunity Commission, giving detailed information regarding his experience in attempting to secure legal services for Title VII claimants which he summarizes as follows:

"This reaction has demonstrated conclusively to me that adequate attorney's fees in Title VII cases are crucial toward involving more members of the private bar in such litigation." (Affidavit, p. 4).

³ The Western Region, NAACP; The Mexican-American Legal Defense and Educational Fund, Inc.; The United Native Americans, Inc.; NOW Legal Defense and Education Fund, Inc.; Women's Equity Action League; National Association for the Advancement of Colored People.

"In sum, I feel compelled to take issue with the majority. I would reserve and remand the case for further consideration of the reasonableness of the attorney's fee due Mrs. Sylvia Roberts." (Slip opinion, p. 10).

The depressing effect of the award herein on securing legal services for those who have already filed charges with the Equal Employment Opportunity Commission can hardly be overestimated. The unfortunate ramifications of this decision will affect not only this attorney, but all those who are presently representing Title VII plaintiffs, or who are contemplating such representation, and warrant a rehearing of this matter by the entire Court.

II. THE COURT ERRED IN ITS FINDING OF FACT RELATIVE TO THE NOVELTY, DIFFICULTY OF ISSUES, AND RESULTS OBTAINED

Apparently in agreement with the entrenched principle that novelty, difficulty of the issues are criteria for setting a fee,⁴ both the trial court and this Court erred in their factual findings in this regard. Unmentioned and disregarded were the uncontested facts that *Weeks*

1. Presented "... important, unsettled questions concerning the proper interpretation of Title VII . . .," *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 229 (5th Cir. 1969).

2. Narrowly defined the bona fide occupational qualification in objective terms for the first time,⁵ thereby sealing this loophole in Title VII which had previously been construed to allow employers to discriminate against women for subjective unsubstantiated reasons (*Bowe v. Colgate*, 272 F. Supp. 332 (S.D. Ind. 1967)).

3. Has been followed in a number of cases brought under Title VII of the Equal Pay Act and other statutes which have been decided subsequently.⁶

Instead, the Court characterized the case as simply "... a Title VII case . . .," in which the appellate court's decision was one dealing with a factual dispute only:

"On appeal, the Court decided that Southern Bell had not satisfied the burden of proving that the job of switchman is within the bona fide occupational qualification exception . . . to 42 U.S.C. Sec. 2000e-2(a)." (Slip opinion, pp. 2-3).⁷

It is not discernible from this language that for the first time the burden was placed on the employer, and that extent of the burden was also delineated.

In contrast to this formulation is that given by Judge Wisdom, in his dissenting opinion:

"Weeks was as un-routine as a case could be. It had been lost below. . . . The pertinent language of Title VII is unclear, the pertinent

⁴ *Clark v. American Marine Corp.*, *supra*, see also Annot., 56 A.L.R. 2d 19, wherein 43 cases are cited in support of the use of these criteria.

⁵ This Court laid down this stringent objective standard: "... in order to rely on the bona fide occupational qualification, the employer has the burden of proving that the reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved." *Id.*, at p. 235.

⁶ A partial list includes *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971); *Rosenfeld v. Southern Pacific*, 444 F.2d 1219 (9th Cir. 1971); *Diaz v. Pan Am. World Airways*, 442 F.2d 385 (5th Cir. 1971); *Rosen v. Public Service Electric and Gas Co.*, 328 F. Supp. 454 (D. N.J. 1971); *Austin v. Reynolds Metals Co.*, 327 F. Supp. 1145 (E.D. Va. 1970); *Cheaticwood v. Southeastern Bell Tel. & Tel. Co.*, 303 F. Supp. 754 (M.D. Ala. 1969); Equal Pay cases are *Shultz v. Wheaton Glass Co.*, 421 F.2d 259 (3d Cir. 1970); *Shultz v. Saxonburg Ceramics, Inc.*, 314 F. Supp. 1262 (W.D. Pa. 1970); state decision: *New York State Division of Human Rights v. New York-Pennsylvania Professional Baseball League*, U.S.L.W. 2661 (1971). See reference to "Weeks Doctrine", 23 *Hastings L.J.* 55, at p. 107 *et seq.*

⁷ The trial court's rendition of the holding of the original appeal was similar in its omissions:

"It was Mrs. Roberts who successfully appealed the case with the result of reversing the judgment of this court that the job of switchman was within the bona fide occupational qualification exception in the Act, 42 USCA, Sec. 2000e-2 (e)(1). It is true that between the judgment of this court and the appeal, the State of Georgia rescinded its prohibition against women being employed in jobs where the lifting of weights of thirty or more pounds was required. Nonetheless, this prohibition was not the sole basis of the decision of this court. The further basis was that the work of a switchman was generally strenuous and unsuited for a woman and the Fifth Circuit concluded that this characterization was unsubstantiated by the evidence." (Order awarding Counsel Fees of July 1, 1971, at p. 4).

legislative history is sparse, and omnipresent is the centuries old tradition that men as men or as legislators should protect women from strenuous or dangerous tasks. . . .

Mrs. Weeks ended her long litigation by fully recovering every dollar she claimed. *The principal parties at interest, however, were the American public generally, and working women in particular.*" (Emphasis supplied) (Slip opinion p. 8).

Coincident with the erroneous factual estimate of the holding of the case was the equally erroneous finding with respect to the difficulty encountered in achieving the result, as indicated by this portion of the Court's opinion:

"Mrs. Roberts did not try the case, but entered it after the notice of appeal had been filed.⁸ Neither her work product, as filed with the Fifth Circuit . . . nor the record on appeal was lengthy. . . . Experienced counsel who reviewed the record and read the briefs as filed with this Court in the original appeal testified that the work product should have been accomplished in 50 to 100 hours." (Slip opinion, pp. 5-6).

"Experienced counsel," referred to in the foregoing, are two attorneys from Savannah, Georgia,⁹ Phyllis Kravitch and Julian Korish. Their testimony would give no guidance and should have been discarded for these reasons:

1. Neither of them was experienced in this field, since neither had ever handled a Title VII case (Tr. 69; 101).

2. Miss Kravitch had never handled a case of first impression (Tr. 68; 80).

3. Neither of them was familiar with the holding of the original appeal or its significance. Mr. Korish was not familiar with the fundamental fact that this was the first appellate consideration of the bona fide occupational qualification (Tr. 107-108), despite his assertion he spent 3½ hours reviewing the case (Tr. 101).

4. Their study of the case in this unfamiliar area of law was practically nil: Miss Kravitch ". . . read it hastily, I did not study it," and admittedly ". . . did not study the brief" (Tr. 73-74).

5. The bias of Mr. Korish was made plain by his statement that he did not think that ". . . the payor in these cases should be *penalized* because it is a novel question" (Emphasis supplied) (Tr. 112). He was not familiar with the fact that this was a criterion by which attorney fees were assessed (Tr. 102).

6. Neither witness had any expertise in the setting of fees in this or any other area, this being their first and only experience (Tr. 94; 117).

This is hardly the sort of impartial, informed testimony on which reliance may be placed in appraising the hours of research and preparation which were needed. Basing an estimate of time required on the length of the record can be nothing more than rankest speculation. Conceivably, many novel issues may be raised in a record of very few pages, and the briefing of such questions ". . . may also necessitate a more time-consuming search for analogous authority," *United States v. Gray*, 319 F. Supp. 871 (D. R.I. 1970), at p. 873.

It is respectfully submitted that an abuse of discretion by the trial court, demonstrated by an inaccurate factual finding regarding the difficulty, novelty of the issues and result, should have been found by this Court in accordance with *Massachusetts Mutual Life Insurance Company v. Brock*, *supra*, and a rehearing en banc should be granted.

III. THE COURT ERRED IN ITS FINDINGS THAT THE TIME SPENT BY COUNSEL SHOULD BE DISCOUNTED AS A FACTOR ON WHICH A FEE SHOULD BE AWARDED

A reading of the opinion indicates the Court accepted, as did the trial court, the correctness of counsel's time: a grand total of 585 hours. Nevertheless, the Court stated,

"Hours claimed or spent on a case is not the sole basis for determining a fee. *Electronics Capital Corp. v. Sheperd*, 5 Cir. 439 F.2d 692, 693. In any event, the time factor has 'dubious virtue . . . as a standard for

⁸ It is urged that judicial notice may be taken that a case, lost by another at the trial stage, presents a more difficult task for the attorney handling the appeal. Mr. Korish, defendant's expert, made this comment also (Tr. 109).

⁹ The difficulty in terms of distance and economics for a Louisiana lawyer to offer live witnesses in Savannah, Georgia, could not be overcome, and hence affidavits of attorneys were offered by plaintiff-appellant.

legal services'; 'when hours of time become a criterion, economy of time may cease to be a virtue.' See Hornstein, *Legal Therapeutics: The 'Salvage Factor in Counsel Fee Awards*, 69 HARV. L. REV. 658 (1956)," (Slip opinion, p. 6).

In arriving at this conclusion, the Court was at odds with the prevailing jurisprudence.¹⁰ Further, the authorities relied on by the Court support quite a different position, as may be seen from a reading of the entire passage from which the language quoted above was taken:

"The dubious value of the time factor as a standard for legal services has been recognized by many courts:

'The value of a lawyer's services is not measured by time and labor merely. The practice of law is an art in which success depends as much as in any other art on the application of imagination—and sometimes inspiration—to the subject matter.'"¹¹ (Emphasis supplied) (*Id.*, at p. 660)

Hence a diametrically opposed conclusion is reached upon a reading of the whole, that is, a fee should be for hours *plus* other factors, but in no event should labor be overlooked. For example, in the case cited above, *Electronics Capital Corp. v. Sheperd*, a fee of \$10,000.00 was awarded for 30 hours work. On an hourly basis this would be in excess of \$300.00 an hour. By way of explanation, the court made this statement:

"Actual time spent in obtaining the judgment is not the only factor to be considered in fixing attorneys' fees. The amount involved, the difficulty of collection, the value of the services rendered to the client and other elements may be considered." (*Id.*, at p. 693).

The Court herein has arrived at a result wholly inconsistent with the principles expressed by Hornstein or in *Sheperd*. Such a result can only be termed a misapplication of a legal standard relative to assessment of fees, which should be reviewed pursuant to the rule in *Massachusetts Mutual Life Insurance Company v. Brock*, *supra*.

IV. AUTHORITIES CITED BY THE COURT FOR THE PROPOSITION THAT NO ABUSE OF DISCRETION WAS PRESENT ARE NOT APPOSITE

An examination of the cases, cited for the principle that the determination of a reasonable attorney fee is within the sound discretion of the trial court (Slip opinion, p. 4), does not support the conclusion that no such abuse was manifest in the case at bar. In two of the cited cases, a much higher figure than awarded here was granted: *Electronics Capital Corp. v. Sheperd*, *supra* (\$10,000.00 for 30 hours); *Hoffman v. Aetna Life Insurance Company*, 411 F.2d 594 (5th Cir. 1969) (\$40.00 per hour awarded in a routine bankruptcy matter); in *B-M-G Investment Co. v. Continental Moss Gordin, Inc.*, 437 F.2d 892 (5th Cir. 1971), \$75,000.00 was awarded although

"there has been no trial in this case, no introduction of evidence or examination of witnesses except on the subject of attorney fees, no protracted conferences or meetings between the counsel for the parties, less than one day in the courtroom before summary judgment was granted." *Id.*, at p. 893)

Calhoun v. Hertwig, 363 F.2d 257 (5th Cir. 1966), involved another bankruptcy case in which the attorney had received a fee previously, and was "... aware of his right to claim a fee . . . and had full opportunity to reserve such claim. . . . He did neither." *Id.*, at p. 262.

Also in apposite is *Culpepper v. Reynolds Metal Co.*, 442 F.2d 1078 (5th Cir. 1971), in which no time sheets were kept, support for the attorney fee in the form of testimony, or affidavits offered.

None of these cases say that the significance of a case should not be considered; none of them say that hours should be downgraded in estimating a fee.

¹⁰ Time and labor is the first criterion of Canon 12, ABA Canons of Ethics, and in Title VII cases, hours spent have been a most important factor: *Clark v. American Marine Corp.*, *supra*; *Rosenfeld v. Southern Pacific Railroad Co.*, *supra*; *Peters v. Missouri Pacific Ry. Co.*, *supra*. See also, Annot., 56 A.L.R. 2d 19, wherein 52 similar cases are cited. During oral argument, Judge Wisdom commented that using hours as a measurement of fee is the customary method in the profession.

¹¹ This quotation is from *Woodbury v. Andrew Jergens Co.*, D. C. 37 F.2d 749, cited with approval in *Sampsell v. Monell*, 167 F.2d 4 (9th Cir. 1947).

Directly in point, however, are the Title VII cases of *Rosenfeld*, *Peters*, discussed above, and *Clark v. American Marine Corp.* In *Clark*, a fee of \$20,000.00 was paid to counsel who worked 580 hours, a little less than were presented herein. *Clark* was not a case of first impression; no backpay was recovered, and no appeal from an unfavorable decision was required.

It is petitioner's earnest contention that the standard of "sound discretion" was not met when these controlling precedents are not followed. Neither the trial court nor this Court have adverted to any reason why the efforts of counsel herein are worth less than those of attorneys in other Title VII cases, or cases involving routine matters in which \$50.00 an hour was assessed.¹²

In view of the importance of the issue of adequate compensation for attorneys bringing civil rights actions, together with the Court's misapprehension of facts and failure to apply the appropriate legal standards applicable hereto, it is respectfully submitted that the Court consider the entire record, and grant petitioner's prayer for a rehearing and rehearing en banc.

SYLVIA ROBERTS.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Rehearing and Petition for Rehearing En Banc and Brief in Support on behalf of Appellant has been served upon counsel for Appellee by placing the same in the United States mail, postage prepaid, this 19th day of September, 1972, addressed to Vincent L. Sgrosso, 1245 Hurt Bldg., Atlanta, Georgia, 30303, and David J. Heinsma, 2900 First National Bank Bldg., Atlanta, Georgia 30303.

Baton Rouge, Louisiana.

SYLVIA ROBERTS.

¹² The trial court's order setting fees herein cited *Clark* and *Massachusetts Mutual Life Insurance Company v. Brock*, in which \$50.00 per hour was awarded the trustee's attorney. It was not stated why the same hourly rate could not be fixed herein, or if there was any qualitative difference in cases of first impression and routine bankruptcy matters.

U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 72-1075

LORENA W. WEEKS, APPELLANT, *v.* SOUTHERN BELL TELEPHONE & TELEGRAPH Co., APPELLEE

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AS AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Motion for leave to file brief Amicus Curiae

For the reasons stated below, the National Association for the Advancement of Colored People hereby respectfully moves this court for leave to file the attached brief amicus curiae in support of appellant's petitions for rehearing and rehearing en banc.

Statement of interest of the National Association for the Advancement of Colored People

Because of the vital importance of the award of attorneys fees to plaintiffs attorneys in Title VII cases to (1) the effectuation of the national policy against employment discrimination, and (2) the National Association for the Advancement of Colored People's (NAACP) program of seeking redress through the courts for acts of racial discrimination, the NAACP sought, and was granted, amicus participation in this case. The interest of the NAACP, as stated in our original amicus brief remains: if private attorneys who represent plaintiffs in Title VII cases cannot look to the courts for the award of attorneys fees comparable to what defendants' attorneys get paid, there will be few, if any, capable attorneys who will be willing and financially able to represent plaintiffs in these vitally important cases. The opinion filed by the majority of this court increases the urgency of our interest in this case. For, by its total failure to set any standards by which to guide the district judge in awarding fees and the appellate courts in reviewing the adequacy of fee awards, this court has, in effect, authorized arbitrary and capricious decisions on the part of the district courts. The uncertainties created by such unregulated "discretion" can only serve to further discourage the already small number of attorneys willing and able to bring these suits from doing so, and thereby frustrate the national policy against employment discrimination.

Discussion

In our original amicus brief before this court, we made arguments concerning the importance of attorneys fees to the scheme of enforcement under Title VII, the difficulty of obtaining adequate legal representation in unpopular civil rights causes (and thus the need for adequate fees as an incentive), the contingent nature of the risk that plaintiffs' attorneys take in Title VII cases, the fact that fees of \$50.00 per hour are routinely awarded in bankruptcy cases in this circuit, and that the fees in a comparable sex discrimination case were awarded at the rate of \$75.00 per hour.¹ The majority opinion chose to ignore each and every one of these arguments; we urge this court to rehear this case so that these serious issues can be given the consideration they deserve.

Moreover, perhaps most disturbing about the majority opinion is its total failure to set any standards for judging the reasonableness of an attorneys fee under Title VII. The order appealed from failed to make any finding of fact or state any rationale for its award of less than minimal fees. Thus, the reviewing court could only guess at the basis on which Judge Bell

¹ See *Weeks v. Southern Bell Tel. & Tel. Co.*, Docket No. 72-1075, Brief for the National Association for the Advancement of Colored People as Amicus Curiae at pp. 5-12.

awarded the fees. Under such circumstances, there was no way in which the reviewing court could tell whether the court below made a reasoned decision or merely picked the \$15,000 figure out of the air.

It is fundamental to the concept of due process of law that standards and guidelines be set down so that judges with discretionary powers will exercise that discretion for the purposes for which it was conferred upon them. Applying this fundamental principle to the instant case, we find that the order of the court below and the decision of this court fail to measure up; there is simply no way to tell what factors determined the decision of the court below to award attorneys fees below the minimum fee schedule. We submit that the appropriate standard for judging the reasonableness of attorneys fees awarded under Title VII must begin with the time spent by the attorney on the case. As a reading of the order awarding the attorneys fees makes clear, many factors including the complexity and novelty of the case, the difficulty of coming in on an appeal, and the result obtained for the client militated in favor of a higher hourly rate than even Ms. Roberts requested. Nothing in that order provides a basis for an award of less than prevailing minimum rates set by the Bar. The opinion of the majority of this Court grasps at the straw that perhaps the judge below found that either Ms. Roberts submitted inflated statements to the court concerning the hours she spent on the case, or that she took three times as many hours as was necessary to perform the work on this case. If, indeed, these were Judge Bell's reasons for awarding the fee that he did, it might be appropriate for this court to defer to his discretion. However, as we have pointed out, Judge Bell made no such finding and this Court's speculations in that regard are no more or less than that: pure speculation. Accordingly, there is simply no way that this court, consistent with legal principles governing reviewable discretion, can defer to a discretion which it does not know was exercised.

In our original brief to this court, we have pointed out what we believe to be the relevant considerations in setting the standards for the award of attorneys fees under Title VII: we respectfully refer the court to that brief. We believe that the establishment of standards is absolutely essential to the proper administration of Title VII. Implicit in this court's refusal to set standards is a retreat from its position that the courts have a constitutional responsibility to remedy discrimination in employment. *Jenkins v. United Gas Corp.*, 400 F.2d 28 (5th Cir. 1968); cf. *Rosen v. Public Service Electric & Gas Co.*, 409 F.2d 775 (3rd Cir. 1969) (sex discrimination case). For the decision of this court means nothing more nor less than that corporate Goliaths can use their vast resources to employ attorneys to defend their discriminatory practices at high hourly rates, while the fees paid to attorneys for the victims of discrimination (for whose protection Title VII was enacted, and in particular, for whose representation Section 706(k) was included in the Act) are left to the whim of trial judges² who are given not the slightest notion of what is reasonable or fair. The inevitable result of such a scheme of awarding attorneys fees is that the victims of discrimination will be left without adequate representation.

Conclusion

We believe that the failure of this Court to set objective standards defining the reasonableness of attorney fee awards under Title VII, as well as its failure to award Ms. Roberts an adequate fee in this case, will frustrate the national policy against employment discrimination. Accordingly, we respectfully urge this Court to rehear the case.

Respectfully submitted.

PAUL J. SPIEGELMAN,
 RUSSELL SPECTER,
 SPECTER & SPIEGELMAN,
Attorneys for Amicus.
 WILLIAM D. WELLS,
Assistant General Counsel, NAACP.

² Many trial judges have been quite unsympathetic to the interests of attorneys representing Title VII plaintiffs. See e.g. *Miller v. International Paper Co.*, 290 F.Supp. 401 (S.D. Miss. 1967) reversed 408 F.2d 283 (5th Cir. 1969).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion for Leave to File Brief Amicus Curiae and Brief for the National Association for the Advancement of Colored People as Amicus Curiae in Support of Petition for Rehearing and Petition for Rehearing En Banc have this the 19th day of September 1972 been served by United States air mail, postage prepaid upon the following counsel for Appellee:

Sylvia Roberts,
Post Office Box 3081,
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PAUL J. SPIEGELMAN.

U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT NO. 72-1075

MRS. LORENA WEEKS, PLAINTIFF-APPELLANT, v. SOUTHERN BELL TELEPHONE & TELEGRAPH CO., DEFENDANT, APPELLEE,

APPEAL FROM THE U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA—
BRIEF IN SUPPORT OF PETITION FOR REHEARING AND FOR REHEARING EN BANC
OF AMICUS CURIAE, THE WESTERN REGION, NAACP, THE MEXICAN-AMERICAN
LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE UNITED NATIVE AMERI-
CANS, INC.

TABLE OF CONTENTS

Table of authorities.

Statement of the case.

Exceptional importance of the case merits rehearing and rehearing en banc.

The award below is contrary to the purpose of the attorneys' fee provlsion of
Title VII and is therefore unreasonable and an abuse of discretion.

Conclusion.

TABLE OF AUTHORITIES

Cases

Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969).

Cooper v. Allen, No. 71-3186, filed Aug. 29, 1972, 5th Cir., 5 EPD ¶ 7952.

Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir.) 1968).

Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

Lee v. Southern Home Sites Corp., 429 F.2d 290 (5th Cir. 1970).

Miller v. Amusement Enterprises, Inc., 426 F.2d 534 (5th Cir. 1970).

Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968).

Weeks v. Southern Bell Telephone & Telegraph Co., 408 F.2d 228 (5th Cir.
1969).

Statutes

42 U.S.C. § 2000e *et seq.*

42 U.S.C. § 2000e-5(k).

STATEMENT OF THE CASE

The award of attorney's fees to the prevailing party in litigation brought under the Civil Rights Act of 1964 is intended to encourage individuals injured by the prohibited discrimination to seek judicial relief. *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968).¹

Lorena Weeks, the plaintiff in this case sought judicial relief under Title VII of the 1964 Civil Rights Act for sex discrimination in employment, 42 U.S.C. § 2000e *et seq.* After the successful conclusion of over three years of representation of the plaintiff, Sylvia Roberts, attorney for the plaintiff, prayed for attorney's fee from the district court under the specific statutory authorization contained in Title VII. 42 U.S.C. § 2000e-5(k).² She sought compensation at the rate of \$40 an hour. plus a fixed fee of \$6,000 for the result obtained on appeal.³

The District Court found that "the award of a fee to [the attorney for the plaintiff] is well within the spirit of the Act." The Court further noted

¹ *Newman* was a case brought under Title II of the 1964 Civil Rights Act, claiming discrimination in public accommodation because of race. It's reasoning has been extended to cases brought under Title VII, see, *Jenkins v. United Gas Corp.*, 400 F.2d 28 (5th Cir. 1968), and cases involving sex discrimination in employment. See, *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 720 (7th Cir. 1969).

² "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fees as part of the costs . . ." 42 U.S.C. § 2000e-5(k).

³ The out-of-pocket expenses claimed were not contested below and were granted. That amount is not in issue on this appeal.

that Ms. Roberts' effort on appeal had caused the Fifth Circuit to reverse the initial negative decision by the District Court. Memorandum Opinion and Order Awarding Counsel Fees, July 6, 1971.

However, the District Court awarded Ms. Roberts attorney's fees at the rate of only \$25 an hour, for a total fee of \$15,000.⁴ This award is between one-fourth and one-third *below* the *minimum* hourly fee schedules established in the states of Georgia, Louisiana and Texas.⁵ The majority opinion of a panel of this Court affirmed the award below on September 7, 1972. Judge Wisdom, dissenting, urged a remand for further consideration of the reasonableness of the fee.

EXCEPTIONAL IMPORTANCE OF THE CASE MERITS REHEARING AND REHEARING EN BANC

The importance of this Court's first appellate decision in *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969), and the impact that decision has had and will continue to have on the employment rights of women are set forth in Appellant's Opening Brief, in Appellants' Petition for Rehearing En Banc, and in the dissenting opinion of Judge Wisdom in this case. (No. 72-1075, Slip Opinion at 8-9). The substantive import of that decision cannot be overemphasized, but this brief will not reiterate these arguments. They have been well presented.

Amici rather point out herein that the decision of this Court in what might mistakenly be viewed as a mere procedural aspect of the case will have an equal or greater impact on employment rights than the substantive decision announced over three years ago. For in this matter of attorney's fees, the Court will be declaring the value the society places on efforts of members of the private bar who successfully vindicate equal employment rights, whether for women, religious, racial or ethnic minorities. Should that value be low, should the decision below be affirmed, the participation of the private bar in Title VII litigation will be discouraged, perhaps essentially destroyed. It will be a rare and dedicated attorney who will accept an employment discrimination case, on a contingency basis, for a \$25 an hour fee, a fee considerably below minimum scale for routine matters in several southern states. It is only the participation of the private bar as plaintiffs' attorneys in Title VII litigation which will ultimately insure the realization of equal opportunity of employment, and the amount of attorney's fees is crucial to this participation. Thus, the award below, so inimical to encouraging this activity by private attorneys, must not be allowed to stand.

In an effort to demonstrate to the Court the importance in real, practical terms of a decision affirming such a paltry attorney's fee award, amici have attached and submit with this brief the affidavit of Oscar Williams, Esq., Director of the EEOC-Title VII Project of the San Francisco Lawyers' Committee for Urban Affairs. While such a submission at this point in the proceedings is unusual, we beg the Court's indulgence as there seemed no other meaningful way to urge upon the Court the practical consequences of affirming the award below.

The affidavit of Mr. Williams forcefully states the critical importance of the amount of an attorney's fee award in Title VII litigation. The struggle to engage the interest of the private bar in employment discrimination litigation, the purpose of the Project Mr. Williams directs, is only beginning to produce results. The turning point in the struggle in the San Francisco area was the award in the settlement of two employment discrimination cases of a plaintiff's attorney's fee of \$100 an hour. Mr. Williams states:

"For the first time since the inception of the Project, I now regularly receive inquiries from attorneys requesting Title VII cases through the Project. And, again for the first time, we now have more attorneys who are prepared to accept cases than cases available. It has been stated to me on several occasions by attorneys that this in-

⁴ The time sheets submitted in this matter showed plaintiff's attorneys expended 585 hours on the various proceedings in this case. The Memorandum Opinion of the District Court indicates that the accuracy of these itemizations was accepted.

⁵ The minimum hourly fee in Georgia under a 1964 fee schedule is \$35.00. The Louisiana fee under a 1963 schedule is \$30.00; and in Baton Rouge, the fee is \$35.00 for routine matters. (Affidavit of Jerry H. Bankston). The fee schedule for Texas established in 1968 is \$40.00 an hour. (Affidavit of George B. Hall).

creased interest in Title VII cases is the direct result of knowing about the attorney's fees in the settlements in *Whittley* and *Atwood*. This reaction has demonstrated conclusively to me that adequate attorney's fees in Title VII cases are crucial toward involving more members of the private bar in such litigation. If the goals of equal opportunity in employment are ever to be realized, this increasing involvement of private attorneys is absolutely necessary." Affidavit of Oscar Williams, attached, page 4.

Not only does the level of hourly compensation trigger participation by members of the private bar, but indeed it is only this figure which is important. The hourly rate is the standard by which attorneys determine the attractiveness of one sort of work over another. This is the traditional standard and it is the standard to which Title VII cases must appeal.⁶ Under no circumstances is the award here under appeal attractive.

No matter how protective the language of the statutes, no matter how vigilant the courts, rights to equal opportunity of employment will not be won or preserved without competent, experienced attorneys willing and able to take cases to trial and through appeal. Statutorily guaranteed rights, as the organizations filing this brief have learned through bitter experience, are not self-executing or self-enforcing. Litigation is unfortunately, but truly, a necessity. The members of private bar, like most other segments of this society, are justifiably concerned to some degree with their material well-being. They must be assured that if their talents, creativity and time are devoted to a still unpopular, complex and novel field they will be rewarded on a scale competitive with other less onerous and complicated work. Thus this petition presents a question of exceptional importance and merits a rehearing and rehearing en banc.

THE AWARD BELOW IS CONTRARY TO THE PURPOSE OF THE ATTORNEY'S FEE PROVISION OF TITLE VII AND IS THEREFORE UNREASONABLE AND AN ABUSE OF DISCRETION

The opinion of the majority treats the review of the award of the amount of attorneys' fees in this case as if it were an ordinary run of the mill attorneys' fee case, undistinguished and undistinguishable from any other situation where an attorney claims underpayment. It has been demonstrated above that the importance of this case in furthering the real and practical attainment of equal employment rights distinguishes this matter sufficiently to merit rehearing. Further, it is demonstrated below that the law controlling the award of attorneys' fees in public interest civil rights litigation is distinct and distinguishable from the controlling law in other fields. These distinctive aspects of the law, the primary point of the Amicus Brief earlier filed by the Western Region, NAACP, The Mexican-American Legal Defense and Educational Fund, Inc. and the United Native Americans, Inc. in this appeal, were overlooked by the court below and by the majority of the panel of this Court on appeal. They must not remain unnoticed.

The provision for the award of attorneys' fees in Title VII cases, as well as in Title II and other civil rights cases, was intended by Congress to encourage individuals injured by the prohibited discrimination to seek judicial relief. This legislative purpose has been announced by the United States Supreme Court and has been reiterated by too many courts to mention here. See, *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). This legislative intent is a continuing and distinctive limitation on the discretion of the courts when they consider whether to award attorneys' fees in such cases.

A recent decision of a panel of this Court has carefully discussed both the reason and the manner in which discretion to award attorneys' fees has been circumscribed. In *Cooper v. Allen*, No. 71-3186, filed August 29, 1972,⁷ a case charging racial employment discrimination under 42 U.S.C. § 1981, the Court stated:

Ordinarily, whether to award attorneys' fees is in the sound discretion of the trial judge, and a denial of attorneys' fees is overturned only upon a

⁶ This standard is even more important in that attorneys undertaking Title VII litigation on a contingency basis must predict that they will lose half of their cases and therefore be uncompensated. The hourly rate must take this contingency into account.

⁷ The opinion is reported at 5 EPD ¶ 7952.

showing of abuse of discretion. However, in *Newman v. Piggie Park Enterprises*, 1968, 390 U.S. 400, 402 the Supreme Court narrowed the trial judge's discretion:

"If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provisions for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to be untenable, but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II.

"It follows that one who succeeds in obtaining an injunction under that Title should ordinarily recover attorneys' fees unless special circumstances would render such an award unjust."

Admittedly, *Newman* involved a suit brought under a civil rights statute which makes specific allowance for attorneys' fees. But in *Lee v. Southern Home Sites Corp.* 429 F.2d 290 (5th Cir. 1970), this Court extended the *Newman* doctrine to section 1982 suits. There is no relevant distinction between a section 1982 suit and a section 1981 suit such as this one. [Cooper] See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). Moreover, in *Lee* this Court said that, when a court refused attorneys' fees in a 1982 suit (and by analogy in a 1981 suit), it must set out the findings of fact and grounds upon which its refusal rests.

If on remand the district court cannot articulate specific and justifiable reasons for its denial of attorneys' fees, it should make a reasonable award. *Cooper v. Allen*, No. 71-3186, filed August 29, 1972, reported at 5 EPD ¶ 7952, page 6534.

Thus, the legislative purpose, and the intent of Congress to encourage litigation, of necessity limit the discrimination of the courts to deny attorney's fees, despite the fact that the language of the statute on its face contains no such words of limitation.⁸

It is likewise true, although no court has ever articulated this precise precept, that the Congressional intent to encourage litigation by, and representation of, plaintiffs, in Title VII cases must limit the discretion of the court when it is determining what fee is reasonable. A reasonable fee must be one of sufficient liberality to conform with the intent of the statute to encourage litigation. It is totally illogical to limit the discretion of the courts in awarding fees and not to carry the rationale of this limitation forward to the next step and provide a more careful scrutiny of the amount of the fee awarded than occurs in other types of cases.

Thus, it is respectfully submitted, the majority opinion in this case on appeal is mistaken when it states "that the test of reasonableness of an attorney's fee award in a Title VII case, as in others, is whether the trial judge acted within sound judicial discretion." Slip Opinion, page 4. For the court's freedom to set the amount of fees awarded is not the traditional, almost unreviewable discretion, but a range of choices, informed by the many factors reviewed by Judge Bell in his opinion, but finally, and most importantly, controlled by a realistic judicial assessment of what fees will encourage and increase the participation of members of the bar in employment discrimination litigation.

It is this final assessment, required by statutory intent, which is lacking in the award here under review. The failure renders the award unreasonable and an abuse of discretion. For, accepting the accuracy of Ms. Roberts' time sheets submitted in this matter—and the Memorandum Opinion below indicates that the itemization was accepted as accurate—she was compensated at the rate of only \$25 an hour. This award is between one-fourth and one-third below the minimum hourly fee schedules established in the states of Georgia, Louisiana, and Texas.⁹

Even though the hours spent may not be the sole criterion upon which an award of attorney's fees should be based, nonetheless, the calculation of the rate of pay per hour will be the crucial figure for attorneys evaluating their willingness to undertake employment discrimination litigation. In addition, the hourly rate of pay is a traditional and useful beginning point

⁸ "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs . . ." 42 U.S.C. § 2000e-5(k).

⁹ See summary of evidence in footnote 5, *supra*.

in calculating attorney's fees. It should not be disparaged or disregarded in this instance.

The award, far from conforming with statutory intent and thereby encouraging representation of employment discrimination plaintiffs, openly thwarts that intent. The court below, and this Circuit, if the affirmance of that decision stands, will be announcing that only attorneys willing to sustain substantial financial loss should even consider contingent-fee employment discrimination litigation. How can this Court or any court believe that a fee of this sort will attract members of the private bar to a field which even now remains complex, novel and unpopular.

The award as it presently stands affirmed is calculated to make the area of employment discrimination litigation as unattractive to attorneys as possible. It is not competitive with any other area of endeavor for an attorney. Attorneys will be asked to undertake litigation which will no doubt alienate substantial numbers of other clients and which will often demand more creativity and skill than most litigation for a below-minimum scale fee.

The affirmance of the decision below will be a disastrous retreat for a court long and justly noted for its strong and affirmative stance on equal rights. It will eliminate the possibility that members of the private bar will begin to share the burden of litigation too long borne by organizations such as those filing this brief. That burden is beyond their capabilities.

Nor did Congress intend such groups to have this entire responsibility. It intended private litigation to secure employment rights and it provided for attorney's fees to encourage that litigation. As this Circuit has declared:

Congress did not intend that vindication of statutorily guaranteed rights would depend on the rare likelihood of economic resources in the private party (or class members) or the availability of legal assistance from charity—individual, collective, or organized. An enactment aimed at legislatively enforcing human rights and the dignity of man through equality of treatment would hardly be served by compelling victims to seek out charitable help. *Miller v. Amusement Enterprises, Inc.*, 426 F.2d 534 (5th Cir. 1970).

This Court must assure that the amount of fees awarded also serves to encourage such litigation, and it must begin with this case.

CONCLUSION

For the foregoing reasons, we respectfully urge that the Petition for Rehearing and for Rehearing En Banc be granted.

Respectfully submitted.

JO ANN CHANDLER, Esq.
*Attorney for the Western Region, NAACP,
and the United Native Americans, Inc.,
Amicus Curiae.*

MARIO OBLEDO, Esq.
ALAN EXELROD, Esq.
*Attorneys for the Mexican-American Legal Defense
and Educational Fund, Inc.,
Amicus Curiae.*

AFFIDAVIT OF OSCAR WILLIAMS

STATE OF CALIFORNIA

County of San Francisco, ss:

I, OSCAR WILLIAMS, being first duly sworn, depose and say:

1. I am a member of the Bar of the State of California and am the Director of the Equal Employment Opportunity Commission (EEOC)—Title VII Project of the San Francisco Lawyers' Committee for Urban Affairs (S.F. Committee). The S.F. Committee is an affiliate of the Lawyers' Committee for Civil Rights Under Law (National Committee), a non-profit, tax-exempt organization formed in 1963 at the request of President Kennedy. The National Committee has continued its activities at the request of every succeeding President. The National Committee's purpose is to mobilize the legal measures and the moral force of the nation's lawyers to defend and uphold the civil and constitutional rights of the nation's racial minorities and other disadvantaged citizens. The views expressed herein, however, are my own,

growing out of my experience as Director of the EEOC Project in San Francisco.

2. The EEOC Project began in San Francisco in November, 1971. My primary duty, as Director of the Project, is to secure members of the private bar to represent persons who have filed charges of employment discrimination with the Equal Employment Opportunity Commission (Commission) and in which the Commission has been unable to effect a successful resolution. These cases all arise under Title VII of the Civil Rights Act of 1964. Nearly all of them are cases in which the Commission has found reasonable cause to believe that discrimination is taking place.

3. As with most undertakings of this type, numerous problems have been encountered in attempts to involve more members of the private bar in Title VII practice. Because many of the larger law firms represent employers and unions against whom charges of job discrimination have been filed, the vast majority of attorneys who accept cases through the Project are either members of smaller firms or are sole practitioners. Because of limited resources, many attorneys in this category have been reluctant to take Title VII cases in which attorney's fees, if forthcoming at all, may be months or years in the future. Basically, it has been my experience that reasons given for reluctance or refusal to accept Title VII cases by members of the private bar in the San Francisco area fall into three (3) main categories: (a) Lack of experience in Title VII litigation; (b) Inability of the client and/or the attorney to finance anticipated costs of discovery; and (c) The contingency of the fee and concern as to whether adequate attorney's fees will be awarded in cases where plaintiffs prevail.

4. In efforts to counter these objections, we have: (a) Conducted training seminars and offered on-going assistance to attorneys accepting cases through the Project; (b) Sought to obtain funds to defray costs of discovery in selected cases; and (c) Emphasized to attorneys that the Court will effectuate what I believe to be the legislative intent by awarding attorney's fees which will adequately compensate them for their services in Title VII cases.

5. Under these circumstances, response of the private bar has been creditable, and attorneys, in some instances, have accepted Title VII cases at some personal financial sacrifice. Response, however, has been less than enthusiastic.

6. Recently, I was contracted by plaintiffs' attorneys during settlement negotiations in two (2) unreported Title VII cases filed in Federal District Court for the Northern District of California: *Whittle v. Fairchild Semiconductor and Fairchild Camera and Instrument Corp.*, C-71-1927 RFP, and *Atwood v. Bekins Moving and Storage Co.*, C-71-2115 RFP. In both cases, I was personally aware that the settlement agreement provided for attorney's fees to plaintiffs' attorneys based upon an hourly rate of one hundred dollars (\$100.00) and I was unaware that the total fee in *Whittle* was fifty thousand dollars (\$50,000). (The minimum fee schedule in San Francisco is fifty dollars (\$50.00) hourly). Subsequent to the circulation of information concerning the award of one hundred dollars (\$100.00) hourly attorneys' fees in these two cases, I can only say that there has been a marked increase by private counsel in seeking to obtain Title VII cases through the Project.

7. For the first time since the inception of the Project, I now regularly receive inquiries from attorneys requesting Title VII cases through the Project. And, again for the first time, we now have more attorneys who are prepared to accept cases than cases available. It has been stated to me on several occasions by attorneys that this increased interest in Title VII cases is the direct result of knowing about the attorney's fees in the settlements in *Whittle* and *Atwood*. This reaction has demonstrated conclusively to me that adequate attorney's fees in Title VII cases are crucial toward involving more members of the private bar in such litigation. If the goals of equal opportunity in employment are ever to be realized, this increasing involvement of private attorneys is absolutely necessary.

OSCAR WILLIAMS, *Affiant*.

Subscribed and sworn to before me this 14th day of September, 1972.

HELEN CHODACK,
Notary Public.

DECLARATION OF MAILING

I, the undersigned, say: I am, and was at all time herein mentioned, a citizen of the United States, County of San Francisco, State of California, over the age of 18 years and not a party to the within action or proceeding; that my business address is 433 Turk Street, San Francisco, California 94102; that on the date set forth below. I enclosed two true copies of the attached Brief Amicus Curiae in a separate envelope for each of the persons named below, addressed as set forth immediately below the respective names, as follows:

David J. Heinsma, Esq.,
2900 First National Bank Building,
Atlanta, Ga. 30303.

Vincent L. Sgrosso, Esq.,
1245 Hurt Building,
Atlanta, Ga. 30303.

Sylvia Roberts, Esq.,
Post Office Box 3081,
Baton Rouge, La. 70821.

Each said envelope was sealed and with postage thereon fully prepaid as first-class mail; I deposited the same on the date set forth below, in a mailing facility regularly maintained by the United States Post Office Department for the mailing of letters.

I declare under penalty of perjury that the foregoing is true and correct.
Executed on September 15, 1972, at San Francisco, California.

TILLIE A. LEE, *Declarant.*

U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 72-1075

MRS. LORENA W. WEEKS, PLAINTIFF, v.

SOUTHERN BELL TELEPHONE & TELEGRAPH CO., DEFENDANT-APPELLEE,
SYLVIA ROBERTS, COUNSEL FOR LORENA W. WEEKS, APPELLANT.

BRIEF IN SUPPORT OF PETITION FOR REHEARING AND PETITION FOR REHEARING EN
BANC ON BEHALF OF THE WOMEN'S EQUITY ACTION LEAGUE, AMICUS CURIAE

What is basically at issue in this appeal and petition for rehearing is the policy question of whether or not this Court wants to go on record as saying in effect by the amount of attorney's fee awarded that sex discrimination cases under Title VII are less important than race discrimination cases under the same law.

Decision of this policy question so as to downgrade the importance of eliminating sex discrimination in employment would be contrary to the position taken by other Federal Courts, such as the Third Circuit Court of Appeals in *Rosen v. Public Service Electric & Gas Co.*, 409 F.2d 775 (3d Cir. 1969), where the Court stated: "We do not make the distinction . . . that discrimination on account of sex is any less reprehensible or any less protected than discrimination because of race." See also *Local 186, International Pulp, Sulfite & Paper Mill Workers v. Minnesota Mining & Mfg. Co.*, 304 F., Supp. 1284, 1287, 1289 (N.D. Ind. 1969).

We submit that affirmance of the District Court's award in this case is giving sex discrimination cases a "back seat" in the Fifth Circuit in comparison with recent race discrimination cases such as *Clark v. American Marine Corp.*, 320 F. Supp. 709 (S.D. La 1970), aff'd. *per curiam* 437 F.2d 959 (5th Cir. 1971), where the Court awarded a fee of \$20,000, and *Peters v. Missouri Pacific Ry. Co.*, 3 FEP Cases 793 (E.D. Tex. 1971), where the Court-awarded attorney's fee was \$44,000.

Judge Wisdom in dissenting recognized that such a result on a policy-setting question is unjustified and "does not reflect . . . the importance of the case in the cause of non-discrimination against working women." If the majority two Judges on the panel deciding this Appeal considered the time factor of doubtful value in determining attorney's fees, greater emphasis should have been given, as Judge Wisdom asserted, to the fact that this was a case of first impression; to the novelty and difficulty of the legal issues involved in the case; and to the significance of the result.

For these reasons, we support Appellant Sylvia Roberts' Petition for Rehearing and Petition for Rehearing En Banc.

Respectfully submitted,

RUTH M. FERRELL,
*Attorney for Women's Equity
Action League, Amicus Curiae.*

Senator TUNNEY. Our next witness is Mr. Phillip J. Mause. Mr. Mause is an attorney and author.

STATEMENT OF PHILLIP J. MAUSE, ATTORNEY AND AUTHOR,
WASHINGTON, D.C.

Senator TUNNEY. Mr. Mause, would you be able to summarize your written statement, which will be included in the record in full.

The reason I suggest that, if you read the whole thing I am not going to be able to ask you questions, and I would like to be able

to ask questions. So if you could summarize in maybe 10 minutes, your opening remarks, then I could get into some questions with you.

Mr. MAUSE. Sure.

Senator TUNNEY. I might say your statement has been read already.

Mr. MAUSE. My statement focuses on the question of the effects of the adoption of an across-the-board indemnity system. That is, an across-the-board fee shifting system. That is, a system in which in every case the prevailing party would recover his attorney's fees from the losing party.

Although I conclude—and I will try to explain very briefly why—an across-the-board indemnity system would be undesirable at the present time in the United States, I am strongly in favor of some form of fee shifting in the area of public interest litigation. This presents very difficult questions concerning the definition of what constitutes public interest litigation and the procedures to be adopted for determination of the appropriate fee. I think these problems can be overcome and I think it is an area in which action is very important.

In every situation in which Congress creates a right to sue, and in many in which a right to sue has been created, careful consideration should be given to the possibility of awards of attorneys' fees and in addition, some kind of discretion should be vested in the Federal judiciary to award attorneys' fees in other situations, on the basis of criteria created by Congress, in which the right to attorneys' fees is not created explicitly by statute.

Shifting to the main area of my testimony, that is, the effects of an across-the-board indemnity or fee shifting system, I had done some work while I was at the Kennedy School of Government on a grant from the Russell Sage Foundation, and I have written an article in the area. I find it an extremely complicated area, and an area in which one of the questions which is frequently raised by authors really has no answer, and that is, whether an across-the-board fee shifting system will decrease the total amount of litigation.

Fee shifting has often been suggested as a remedy for court congestion, on the assumption it would decrease litigation, but I feel that it is unclear whether this would occur. As the discussion on pages 3 and 4 of my testimony indicates, litigation usually results from mutual optimism, that is, the plaintiff thinks he has a better chance of winning than the defendant estimates the plaintiff has a chance of winning. When the fee is given to the prevailing party, each party's estimate of his monetary return from the litigation improves. If parties were completely risk neutral, indemnity and fee shifting would cause parties to litigate more often.

However, people do not function that way and a phenomenon called "risk aversion" characterizes most people's feelings about money. In the range in which most litigation occurs, people of modest means are quite "risk averse". For example, many people would prefer to have a sure \$1,000 to a 50 percent chance of \$2,000, or they would not pay out \$1,000 to have a 50 percent chance of receiving \$2,000. Indemnity spreads out the impact of litigation, that is, it makes the defeat more costly and makes the victory more desirable and therefore because of "risk aversion" there may be some discouragement of litigation.

The problem is even more complicated because different individuals have different levels of risk aversion. It is very likely, for example, that General Motors is "risk neutral" over tremendous ranges of money and General Motors would pay a little bit less than a million dollars to have a 50 percent chance of getting 2 million dollars. Individuals of modest means are likely to be more risk averse. Thus, indemnity, which makes litigation riskier, is likely to put individuals of modest means at a disadvantage.

It is simply impossible to qualify these two kinds of impacts and determine which would be dominant and whether there would be a net increase or decrease of litigation. It is, however, possible to say that in an across-the-board indemnity system, litigants of modest means would possibly be put at a disadvantage in comparison with litigants of tremendous wealth.

Other affects of indemnity are that it is likely to cause both sides to spend more money on the case, both because there is a greater difference between winning and losing when there is fee-shifting and because a party is not certain to pay the costs of additional litigation.

It is possible that an across-the-board indemnity system would discourage certain kinds of test cases. I think some of the discussion today indicates that the characterization of litigation as frivolous or in bad faith, as opposed to being an important test case depends very much on the value system of the person making the characterization. One person's frivolous litigation is another person's very important test case.

In addition, indemnity would raise problems of administration, some of which you have discussed already this morning. A very important one is the fee determination of amount of indemnity. In England there is a very complicated cost taxing system which itself is quite expensive and time consuming. There would be a question of whether security for costs, including attorneys' fees, would be required. I think the answer would be it could not be required of litigants who are financially unable to post it.

There is the very difficult question of the relation of an across-the-board indemnity of class actions. If you lose a class action, would the rule be that every member of the class would have to chip in and pay the defendant's attorneys' fees? If so, indemnity would discourage class actions, would discourage people from becoming members of classes and might actually have the effect of discouraging public interest litigation.

I think some of the areas at which a very close look should be taken for providing indemnity—and one of these I believe is especially important—are listed at the end of my written statement. I believe in the small claims area, because fee-shifting becomes more and more important as the attorneys' fee is large in relation to the amount at issue, indemnity should be considered and perhaps in all small claims situations indemnity should be allowable at the discretion of the judge.

I feel it would be highly desirable for at least discretionary indemnity to be awarded to successful criminal defendants. The events of the last few years have indicated that, although some ground-

less criminal prosecutions have ultimately resulted in acquittals, the defendants have been forced to undergo extreme expense and extreme inconvenience in defending themselves, and at least discretion in the trial judge should be created to award indemnity against the Government, in such cases.

I feel that in the public interest area indemnity already exists under statute and should be extended to create a discretionary right of courts to give indemnity under certain criteria that could be set forth by Congress.

I think the focus should be on the creation of indemnity in a variety of situations, a limited form of indemnity, rather than the debate about whether indemnity across the board should be adopted. I feel that at this point across-the-board indemnity would be premature.

Another alternative in public interest litigation, and it could be a discretionary alternative, would be indemnity by the State, even in those cases in which the State was not a party. It could be discretionary with the trial judge whether to indemnify the successful plaintiff from the defendant's funds or by the Government.

I am sorry that I wasn't able to give you a definite answer concerning the impact of an across-the-board indemnity system on the volume of litigation. I feel without further data, it is impossible to do so. I do feel, however, that indemnity is a remedy which should be extended in some of the variety of situations I have set forth.

[The testimony resumes at page 1209. Mr. Mause's prepared statement follows:]

STATEMENT OF PHILIP J. MAUSE

I am grateful for this opportunity to testify concerning an area which has been of great interest to me. My testimony will reflect a law review article I have written which is attached as an appendix to this statement, and work I did while at the John F. Kennedy School of Government, at Harvard University, on a grant from the Russell Sage Foundation and a development leave from the University of Iowa. I hope to submit a paper based upon this work to the Kennedy School, and I will forward the completed paper to the committee when the work is finished.

I think I should state at the outset that my work has not led to any definitive answer to the question of whether the adoption of a system in which the prevailing party obtains his attorneys' fee from the defeated party in litigation (a system which I will call hereafter the "indemnity system") will increase or decrease the total number of cases brought to trial in the United States. As I will point out, the considerations are simply too complex for a definitive answer to this problem without the benefit of field research concerning the behavior of litigants. On the other hand, I think it is possible to identify some of the effects the adoption of indemnity is likely to have, to identify various administrative problems that an indemnity system would create, and to suggest certain limited areas in which the application of indemnity might be desirable.

Many of my conclusions are based upon rather complicated mathematical models. I have decided not to burden you with these today, but to rely primarily upon description. I will use one very oversimplified mathematical model at the outset, and I request your indulgence in bearing with me while I discuss it.

I. THE IMPACT OF INDEMNITY ON TOTAL VOLUME OF LITIGATION

In order to better understand the complexity of this problem, I think it is useful to start with a very simple example and to try to understand the

motivations of litigants in this admittedly grossly oversimplified mathematical model. Let us assume that "P" (plaintiff) has a possible action against "D" (defendant). If successful, "P" will receive \$10,000. If unsuccessful, "P" will receive nothing. Each side must pay \$2,000 to its respective lawyer if the case goes to trial. If a settlement is reached, no legal fees will be incurred. "P" believes he has a 70% chance of winning. "D" believes that "P" only has a 40% chance of winning.

We can express the value that the respective parties place upon "P's" claim in terms of a concept used in decision analysis known as Estimated Monetary Value. The Estimated Monetary Value is the average dollar yield if the situation was repeated over and over again and "P" won as often as his probability estimate would indicate. For "P" the Estimated Monetary Value of his claim is $.7 \times \$10,000$ minus \$2,000 or a total of \$5,000. For "D" the estimated loss is $.4 \times \$10,000$ plus \$2,000 or \$6,000. If both "P" and "D" act according to their Estimated Monetary Value or loss, "D" would be willing to settle by paying any amount up to \$6,000 rather than have the case go to court. "P" would be willing to settle for any amount exceeding \$5,000 rather than having the case go to court. In this situation, it is likely that a settlement will be reached between "P" and "D" some place between \$5,000 and \$6,000.

Under indemnity, "P's" estimated value changes. He now no longer has to pay a sure \$2,000 to his attorney. Rather, his estimated value now consists of $.7 \times \$10,000$ minus the chance of having to pay both attorney's fees $(.3) \times \$4,000$ (or \$1,200). Thus, "P's" total monetary value for the claim is \$5,800. The defendant's monetary loss also changes. He now estimates his loss at $.4 \times \$10,000$ plus his chance of having to pay both attorney's fees $(.4) \times \$4,000$ (or \$1,600) adding up to a total estimated loss of \$5,600. The plaintiff will not settle for less than \$5,800; the defendant will litigate the case rather than pay any more than \$5,600. Thus, without knowing any more, we can assume that the parties will litigate.

I have developed formulas which indicate that indemnity will tend to increase the plaintiffs estimated gain and decrease the defendant's estimated loss and therefore increase the number of cases in which the plaintiff's estimated gain (the figure below which the plaintiff is unlikely to settle) exceeds the defendant's estimated loss (the amount of money above which defendant is unlikely to settle).

Based upon this information alone, one would tend to conclude that indemnity would increase the incidence of litigation and discourage settlement. Unfortunately, the behavior of human beings cannot be expressed in the simple model that I have presented here. There are a number of other factors which have an impact upon the decision of parties to litigate or to settle.

1. *Risk aversion.*—The concept of "risk aversion" has frequently been used in the disciplines of Decision Analysis and Operations Research. Risk aversion is the tendency of people to prefer a sure benefit to a probability of a larger benefit—even when the Estimated Monetary Value of the probability is equal to or greater than the sure benefit (for example, I may prefer \$50,000 to the opportunity to receive \$100,000 if a coin which is flipped comes out heads). Risk aversion will always tend to promote settlement and indemnity may increase this effect. This is because indemnity "spreads out" the possible outcomes of litigation by making defeat more disastrous and victory more attractive. This "spreading out" increases the impact of risk aversion. It is impossible, without more data, to determine whether risk aversion will compensate for the effect I have described above and result in indemnity actually decreasing the incidence of litigation.

This problem is complicated by the likelihood that different individuals and organizations which litigate have different levels of risk aversion over different ranges of money. It is very likely that large institutional litigants are not extremely risk averse. On the other hand, individuals of modest means may be highly risk averse. Thus, indemnity may place the litigant of modest means at a substantial disadvantage dealing with an institutional litigant. In fact, it is my opinion that one of the serious drawbacks of indemnity is the danger that it will place litigants of modest means at a disadvantage due to the impact of risk aversion.

2. *More careful probability assessments.*—In the example above, each party made an assessment of the likelihood of a plaintiff's recovery in determining the range in which settlements would be acceptable. This determination may be made more carefully if the danger of an incorrect assessment is greater. Thus, without indemnity, a plaintiff whose lawyer is on a contingent fee may not carefully estimate the chance of victory because he loses nothing if he is defeated. If indemnity is adopted, a plaintiff might more carefully strive to predict the probability of victory with precision. This may have the effect of promoting settlements by forcing each side to investigate more thoroughly the likelihood of various outcomes of litigation before litigation is commenced.

Without more specific data concerning risk aversion and the effect of indemnity on probability assessments it is impossible to determine the net impact of indemnity on the incidence of litigation. On the other hand, the relevance of risk aversion points out an important consideration—the probability that indemnity will dampen or discourage litigation on the part of those of modest means.

II. OTHER EFFECTS OF INDEMNITY

1. *Cases which are settled under either system.*—Indemnity will affect the size of the settlement in cases which are settled under either system. Thus, if one party owes another party \$10,000 and both parties are absolutely certain that \$10,000 will be recovered if the case goes to court, without indemnity a debtor may be able to persuade the creditor to accept some amount less than \$10,000 rather than bring the case to court and wind up with \$10,000 minus his attorneys' fee. Under indemnity, this would be less likely to occur and the settlement would be more likely to approximate \$10,000.

In addition, indemnity would cause those litigants who are more risk averse to accept lower settlements than those who are less risk averse. This again might result in settlements relatively disadvantageous to citizens of modest means.

2. *Indemnity may lead both sides to spend more on litigation once a case is commenced.*—Economic analysis would indicate that a party will spend money on litigation until the point at which the marginal benefit equals the marginal cost. But under indemnity, a party does not necessarily have to pay for his own litigation expenses: he may be able to obtain compensation for such expenses from the other side if he is successful. Thus, indemnity may make parties more likely to spend more money in order to increase the probability of victory, all the while realizing that they may not have to pay for these additional expenses.

3. *The discouragement of test cases.*—It is at least likely that many cases are brought with less than an even chance of success because of the party's desire to establish an important principle. These test cases might be discouraged if litigants knew in advance that they would have to pay the attorneys' fee of the opposing side in the event they lost. It should be noted that this phenomenon is similar to a frequently cited advantage of indemnity systems—the discouragement of "frivolous" litigation. It should be obvious that an important value judgment is contained in this characterization—one man's "frivolous" litigation may be another man's important "test case."

III. PROBLEMS IN THE ADMINISTRATION OF INDEMNITY

1. *Determination of the amount of indemnity.*—It is unlikely that indemnity could ever be administered in a way in which one side would be simply forced to pay the total attorneys' fees of the other side. Instead, the loser's liability would probably be limited to "reasonable fees." In England, this has led to a complicated "taxing" procedure which is expensive and time-consuming in itself—an effort to determine which of a party's fees are reasonable and therefore taxable to the loser. Some such procedure would have to accompany the adoption of indemnity in the United States.

2. *Security for costs.*—If a defendant were allowed to demand that a plaintiff post security for his probable liability for attorneys' fees before bringing suit, the courthouse door would be shut to many litigants. But, unless this were allowed, many successful defendants would be empty-handed when they

attempted to obtain indemnity from plaintiffs who were financially unable to provide it. I am sure that this dilemma would be resolved against the requirement of security for costs—at least in those cases in which the plaintiff is indigent or economically unable to post such security.

3. *Relation of indemnity to class actions.*—Consistently applied, an across-the-board indemnity system would require the plaintiffs in a losing class action to pay the attorney's fees of the successful defendants. If all members who had decided to remain in the class were assessable it would seem that the desire of prospective class members to join a class would be lessened. In addition, it would seem that requirements for notice in class actions would become more strict if class membership implied possible liability for the defendant's attorney's fees.

IV. SOME POSSIBLE AREAS FOR THE LIMITED APPLICATION OF INDEMNITY

I tend to be skeptical and feel that it is not desirable for indemnity to be applied to all forms of civil (and possibly criminal) litigation. On the other hand, I would strongly support its adoption in specific areas. We already have indemnity in many areas of the law—usually created by statute. More experience with its operation might help us to reach a more intelligent conclusion concerning the desirability of its adoption across the boards. The following is a short and admittedly incomplete list of some areas in which consideration should be given to the adoption of limited indemnity:

1. *Small claims.*—The importance of indemnity increases dramatically when the attorneys' fees are large in relation to the amount at issue. Indeed, under the American system, some small claims become virtually unenforceable because of the costs of recovery. I would suggest that in any area in which small monetary amounts are at issue (for example, voting rights) indemnity be considered. Likewise, it is conceivable that an across-the-board application of indemnity to all small claims (for example, all claims in which a plaintiff demands less than \$1,000) might be desirable. Perhaps, it may be more desirable to limit indemnity in such situations to the discretion of the trier of fact.

2. *Criminal cases.*—Although indemnity against an unsuccessful defendant might raise serious constitutional questions (conditioning the right to raise a defense upon assumption of the risk of paying the Government's expenses), it may be desirable to allow at least discretionary indemnity in favor of successful criminal defendants. Certainly, the events of the last few years have evidenced at least the possibility of bad faith in certain criminal prosecutions. If a trial judge were to be given the discretion to award attorneys' fees to the successful defendant such prosecutions might be discouraged and, even if not discouraged, would result in less disastrous consequences to the innocent defendants.

3. *"Public interest" litigation.*—Many statutes creating the right to sue in recent years have included indemnity provisions. Congress, when it creates the right to sue, should always consider the possibility of providing indemnity in favor of the successful litigant. It is beyond the scope of my testimony to catalog the areas in which this is appropriate, but they are numerous.

4. *The "tender offer" system.*—One variation on indemnity suggested in a relevant law review article which may be of interest is the following: At any time before a case came to trial a plaintiff could lower the amount stated in his complaint to any amount in his discretion. In addition, the defendant could submit to the court an offer of a certain amount of payment to the plaintiff. If the verdict was below the defendant's offer, indemnity would be granted in favor of the defendant. If the verdict was greater than the plaintiff's demand, indemnity would be granted in favor of the plaintiff. If the verdict fell below the plaintiff's demand, but above the defendant's offer, each side would pay his own attorney. This system might encourage settlement, and would give raise to an interesting "game" between the plaintiff and the defendant before the trial. The paper which I am preparing for the Kennedy School will contain a further discussion of the possible impact if this type system.

5. *Indemnity in the judge's discretion.*—One variation might be to allow the judge complete discretion to award indemnity (for example, "when the

awarding of indemnity to the prevailing party would further justice"). This would give the judge immense power and might lead to abuses. On the other hand, experimentation with this in a given jurisdiction might lead to a better understanding of the considerations which should govern the award of indemnity. It should be noted that there is now considerable experience with discretionary indemnity under various federal statutes (for example, the Public Accommodations Act).

6. *Indemnity by the State*.—It may be desirable in some situations to allow the prevailing party to be indemnified by the state rather than by the losing party. Once again, this alternative should be considered by Congress whenever it creates a new right to sue on behalf of the public.

I hope I have not simply muddled the waters in this area. I feel it is an area of important public concern and an area in which the Bar's lack of interest has been disappointing. I also must express my opinion that an adoption of an across-the-boards indemnity system in the United States at this time would be undesirable. I feel that the greatest danger is the possible dampening effect that it might have on the willingness of citizens of modest income to litigate their grievances in court. On the other hand, I think there are a number of forms of limited indemnity which are extremely interesting and worthy of further consideration. I also think that indemnity should be considered by Congress whenever a new right to sue is created—especially in the public interest area.

Thank you for your attention to my remarks.

Senator TUNNEY. Your model on page 4, which states—"under indemnity, 'P's' estimated value changes. He no longer has to pay a sure \$2,000 to his attorney—deals only with cases where there is an expectation of monetary recovery, does it not?"

Mr. MAUSE. That is correct.

Senator TUNNEY. And you presume that the winning party, plaintiff or defendant, will have his fees paid by the loser?

Mr. MAUSE. That is correct.

Senator TUNNEY. While I assume this would call for a guess, can you tell the committee what the effect indemnity, as you call it, would have on the number of injunctive suits? Would it promote settlement or litigation?

Mr. MAUSE. I suppose you could—and I know my friends in decision analysis and operations research would be quick to do this—would say an injunction suit is really just like a damage action and you can put a dollar value on the injunction. I think that is a very difficult thing to do and I think it would be a difficult thing to create a mathematical model for.

I would tend to think there might be a tendency to increase litigation, because the same conceptual situation would occur, that is, the litigation is caused by mutual optimism, each side assuming it has a better chance than the other side's characterization of its chance and therefore assuming that it is less likely to pay both attorneys' fees in the case indemnity is required.

Senator TUNNEY. How about injunctive suits against the Federal Government or State governments?

Mr. MAUSE. I think it is hard to use these mathematical models to determine why large bureaucracies decide to sue rather than settle a certain case, because the man making the decision is not having the attorneys' fees taken out of his own pocket.

I certainly think one way indemnity awards, indemnity for plaintiffs, would obviously encourage litigation. Whether the threat of having to pay the Government some amount which represents the

Government's cost for defending an injunction, if one were unsuccessful, whether that would discourage litigation more than the other amount would encourage it is, as an overall effect, impossible to say. I think there are a number of cases now, however, in which parties have relatively sure claims, that is, have very strong claims on which they put very high percentage chance of recovery which they cannot bring, because of the failure, the inability to obtain attorneys' fees.

So there are certain cases in which parties feel they have a very strong chance now which are not being brought, which would be brought if there were indemnity.

Senator TUNNEY. Aren't there factors beyond economics which often go into the decision to litigate, such as moral conviction or raising a public issue to high visibility?

Mr. MAUSE. Definitely. And these models are necessarily extremely oversimplified. The point I wanted to make, even using these very simple mathematical models, the question is ambiguous. There are a great variety of reasons people litigate. I think some people may even be pathological litigators and seek litigation as an alternative to psychoanalysis. It would be very hard to work these things into a mathematical model.

Senator TUNNEY. On page 6 of your testimony you state that indemnity, at least across the board, would place the individual of modest means at a disadvantage in dealing with the institutional litigant because of risk aversion. Could you explain that a little bit more fully and how this would work if the relief sought is injunctive?

Mr. MAUSE. If the relief sought were injunctive, you would still have the problem, although it would be less of a striking problem. Let me step back and say that another system besides the absence of indemnity, which is quite unique in the American legal system, is the contingent fee and the contingent fee allows somebody of modest means, together with the absence of indemnity, to bring a monetary action without any risk at all. That is, if he loses the case, he loses nothing at all. Indemnity would change that. I suggest in the injunctive area, it is already impossible to bring an action without any fee at all, or without any risk at all, because the absence of contingent fees in the injunctive area means that a plaintiff has to pay his own attorney.

So the problem of risk aversion disadvantaging litigants of modest means might be less over in the injunctive area than it is in the area of monetary actions, where under the current system he can bring the action without any risk of losing anything except his time.

Senator TUNNEY. On page 12 of your testimony you mention that indemnity increases in importance in the small claims area. How can you insure against abuse by plaintiffs in this case?

Mr. MAUSE. I don't understand exactly what you mean by abuse by plaintiffs.

Senator TUNNEY. Well, the situation—let's just read the language here. You say:

The importance of indemnity increases dramatically when the attorneys' fee is large in relation to the amount at issue. Indeed, under the American system,

some small claims become virtually unenforceable because of the costs of recovery. I would suggest that in any area in which small monetary amounts are at issue—for example, voting rights—indemnity be considered. Likewise, it is conceivable that an across-the-board application of indemnity to all small claims—for example, all claims in which a plaintiff demands less than \$1,000—might be desirable. Perhaps, it may be more desirable to limit indemnity in such situations to the discretion of the trier of fact.

Now, if the defendant is right, it still may be cheaper for him to settle rather than to pay the cost of the attorney. Is that not correct?

Mr. MAUSE. That is true, but, of course, it also may be cheaper for the plaintiff to forebear from bringing any action, rather than to pay the cost of the attorney.

Are you suggesting that a plaintiff might abuse this system?

Senator TUNNEY. Yes.

Mr. MAUSE. By setting his complaint lower than the real amount of the injury?

Senator TUNNEY. Well, not necessarily, but it may be that the plaintiff would bring so-called frivolous suit with the expectation that the defendant would settle rather than pay the cost of an attorney.

Mr. MAUSE. Under indemnity?

Senator TUNNEY. Yes.

Mr. MAUSE. But if it was a frivolous suit, by hypothesis, that is a case in which the defendant is likely to win—

Senator TUNNEY. I am assuming that you would have a plaintiff's indemnity, not a defendant's indemnity.

Mr. MAUSE. I still don't see how that would encourage frivolous suits any more than the current system, in which the plaintiff could do the same thing. If it is frivolous, that is a suit in which there is a very low probability of plaintiff winning. Indemnity in favor of plaintiff has very little effect on the matter at all, because it is very unlikely that the plaintiff will win and therefore receive indemnity.

Senator TUNNEY. Let's take it one step above the frivolous suit, where there is a very modest chance the plaintiff would win, but the defendant would say, well, look, it is better to pay off rather than to run the risk, small as it may be, of losing not only the amount of damages that plaintiff is asking for, but in addition having to pay his attorneys' fees and my attorneys' fees, too.

Do you think there is any need to be concerned about indemnity in that type of situation, or don't you think it would really make much difference to the defendant?

Mr. MAUSE. Well, mathematically, it is a matter of degrees. The defendant is not going to be willing to pay a sizable settlement, unless he puts a fairly high probability on the plaintiff's chances of victory. And, of course, it is a matter of degree as to how much settlement you would pay for how much probability.

Naturally, there are cases which are frivolous, but if you are rigorously mathematical about it, the cases where there is very low probability of plaintiff's victory, are not encouraged by indemnity in favor of plaintiffs, it seems to me, because it is very unlikely indemnity will ever be awarded.

Senator TUNNEY. Will indemnity raise legal fees because clients know they won't have to pay if the attorney is successful?

Mr. MAUSE. My guess would be that if we had across-the-board indemnity, we would go to the English system of two levels of legal fees, that is, an attorney would receive a certain amount from the losing party and then would probably charge an additional amount to his own client.

I don't imagine the situation in which the attorneys' fee system would change so that a winning attorney would just send his bill to the losing party and have an automatic payment coming from a losing party. I imagine there would be some kind of system for determining what is reasonable. Then there would be a separate issue as to whether any additional amount under some form of contract was due to the attorney from the prevailing party himself.

This would add a certain amount of administrative expense and would consume some time. I understand that in England, it is even an issue when you fight about how much the fee should be and you lose on the issue of how much the fee should be, whether you have to pay the attorneys' fees for the action in which it was decided, whether the fee was reasonable, and I suppose you could reach an infinite regress in our courts. The legal system has shown a tremendous ability to develop new forms of action, and I suppose we can be arguing about whether the fee on the action to determine the fee on the action to determine the fee was reasonable at some point.

But I do not think that this is an insuperable problem.

Senator TUNNEY. Thank you very much. We really appreciate your thoughts and observations. I think you have been quite precise in your definition of the problem and I want to thank you for that.

Mr. MAUSE. Thank you, Senator. And I will try to send in some additional work I am doing, if I can finish it up in the next 30 days.

[The material referred to above follows:]

**WINNER TAKES ALL:
A RE-EXAMINATION OF THE INDEMNITY SYSTEM**

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In recent years, an increasing number of writers have advocated that the "costs" awarded the winner of a civil lawsuit be increased to reflect the actual expenses of litigation—including attorney's fees.¹ The adoption of this practice, often denominated the "English" or "indemnity" system, has been hailed by its partisans as the tonic for a wide variety of ailments that beset American procedure. Our overcrowded courts would be liberated from the burden of deciding "spite," nuisance, and other frivolous suits because the litigants who instigate such lawsuits under the current American system would be deterred from these harassment tactics by the fear of having to reimburse the defendant.² Indemnity, it is often asserted, would further alleviate court congestion by encouraging other potential litigants to settle in an out-of-court compromise.³ In addition, the impact of indemnity on the cases that appeared in court would be to reduce time-consuming and wasteful dilatory tactics.⁴ Paradoxically, it is also asserted that indemnity would encourage indigent parties to seek justice in the courts and would encourage lawsuits for small amounts.⁵ Finally,

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¹ Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792 (1966); Ehrenzweig, *Shall Counsel Fees be Allowed*, 26 CALIF. S.B.J. 107 (1951); Goodhart, *Costs*, 38 YALE L.J. 849 (1929); Greenberger, *Appellate Review in England and the United States—Who Bears the Ultimate Burden?*, 1 DUQUESNE L. REV. 161 (1963); Greenberger, *The Cost of Justice: An American Problem, An English Solution*, 9 VILL. L. REV. 400 (1964); Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?*, 49 IOWA L. REV. 75 (1963); Lyman, *Our Obsolete System of Taxable Costs*, 25 CONN. B.J. 141 (1951); McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 MINN. L. REV. 619 (1931); Stoebuck, *Counsel Fees Included in Costs: A Logical Development*, 38 U. COLO. L. REV. 202 (1966); Note, 53 COLUM. L. REV. 78 (1953).

² Ehrenzweig, *supra* note 1, at 109; Kuenzel, *supra* note 1, at 78-80; McCormick, *supra* note 1, at 641; Stoebuck, *supra* note 1, at 202; Note, 53 COLUM. L. REV. 78, 82-85 (1953).

³ Conard, *The Economic Treatment of Automobile Injuries*, 63 MICH. L. REV. 279, 315-16 (1964); Greenberger, 9 VILL. L. REV., *supra* note 1, at 405; Stoebuck, *supra* note 1, at 202; Note, 53 COLUM. L. REV. 78, 86-87 (1953).

⁴ Goodhart, *supra* note 1, at 862-72; Greenberger, 9 VILL. L. REV., *supra* note 1, at 404-05; Kuenzel, *supra* note 1, at 80; Note, 53 COLUM. L. REV. 78, 87-93 (1953).

⁵ Ehrenzweig, *supra* note 1, at 109; Goodhart, *supra* note 1, at 875-76; Kuenzel, *supra* note 1, at 84-85.

indemnity is asserted to achieve justice by providing a victorious plaintiff with full recovery and freeing a winning defendant from the expense of proving that he should not be held liable.⁶ These arguments are often buttressed by comparative analysis of procedure in countries which have indemnity systems and historical arguments which tend to show that the current absence of indemnity in the United States is the product of legislative accident rather than purposeful judgment.⁷

By and large, this torrent of law review articles has been met with legislative apathy. Although some states have adopted indemnity for certain classes of cases⁸ and under some federal statutes the victorious litigant does receive his actual litigation expenses from the loser,⁹ no state has adopted indemnity for all cases and the basic pattern in the United States has remained one in which each party to a civil lawsuit bears the burden of his own expenses.¹⁰ There has been no sustained effort to articulate justifications for this deviation from common practice in most other countries. It is the feeling of this writer that indemnity is unquestionably an appropriate procedural device in certain classes of cases—although the definitional problem of determining the appropriate classes is not a simple one. On the other hand, the introduction of an across-the-board indemnity system has raised a number of problems that have been largely ignored by commentators. In addition, many of the asserted advantages of a general rule of indemnity must be characterized as illusory—at least until more evidence concerning the behavior of litigants is somehow made available.

The primary relevance of an analysis of this problem is to provide both an impetus and a focus for legislative reform. But a formulation of the problem should also influence the courts in construing existing

⁶ Ehrenzweig, *supra* note 1, at 107-08; Greenberger, 9 VILL. L. REV., *supra* note 1, at 401, 406-07; McCormick, *supra* note 1, at 643.

⁷ Goodhart, *supra* note 1, at 873-74; Kuenzel, *supra* note 1, at 81; McCormick, *supra* note 1, at 641-42; Stoebuck, *supra* note 1, at 203; Note, 53 COLUM. L. REV. 78, 80-81 (1953).

⁸ *E.g.*, N.Y. GEN. CORP. LAW §§ 63-68 (Supp. 1969) (reasonable attorney fees awarded in stockholders' derivative suits); ORE. REV. STAT. tit. 2, § 20.010-.095 (Supp. 1968) (reasonable attorney fees to be awarded to the prevailing party); WASH. REV. CODE § 26.08.090 (1950) (reasonable attorney fees to innocent party in divorce or annulment action).

⁹ *E.g.*, Tort Claims Act, 28 U.S.C. § 2678 (1964) (court may award successful plaintiff reasonable fees); Securities Act of 1933, 48 Stat. 82 (1933), as amended, 15 U.S.C. § 77k (1964) (reasonable attorney fees to successful plaintiff); Fair Labor Standards Act, 29 U.S.C. 216 (1964) (reasonable attorney fees to successful plaintiff); Housing and Rent Act, 50 U.S.C. App. 1895 (1964) (reasonable attorney fees to successful plaintiff).

¹⁰ Greenberger, 1 DUQUESNE L. REV., *supra* note 1, at 165; McCormick, *supra* note 1, at 638. See generally Stoebuck, *supra* note 1.

statutory provisions and in exercising their equitable power to fashion appropriate remedies.

I. ADVANTAGES AND DISADVANTAGES OF INDEMNITY

A. Justice

The argument that indemnity would somehow further "justice" is usually bottomed on a perception of the inconsistency between the net financial results of lawsuits in America and the substantive rules of law which putatively govern the outcome of these suits. Thus, if *A* owes *B* five hundred dollars and refuses to pay, *B* should be able to sue and recover five hundred dollars, rather than five hundred dollars less court and attorney's fee. Likewise, if *A* sues *B* and the court holds that *B* owes *A* nothing, *B* should lose nothing. Absent indemnity, however, *B* has lost the expenses incurred during litigation. In each case, the mechanics of the operation of the judicial system has diminished the theoretically "just" result for *B*, the successful litigant.

The difficulty with this analysis is that it does not support the proposition that *A* should be compelled to indemnify *B*. The mere fact that litigation expenses have damaged *B* through no fault of his own does not compel the conclusion either that *B* should be made whole, or that *A* should be bound to make him whole, rather than, for example, the state. If *A* is to be made to pay *B*'s costs, justice, or even a consistent adherence to the substantive rules which determine when one party is liable to pay damages to another, would seem to require either a finding that *A* has somehow wronged *B*, or that some other social policy justifies shifting *B*'s loss to *A*.

A may be considered a wrongdoer because of his role in the litigation. In the first case, *A*'s refusal to settle out of court for the full five hundred dollars is, after all, what forced *B* to resort to the adjudicative process and incur the expense. In the second case, *B* was forced to defend himself because *A* instituted the lawsuit. In each case, *B*'s expense was caused by *A*'s refusal to agree with *B* on the merits of the case before the trial. If such refusal is wrongful, *B*'s damage has been caused by *A*'s wrong. However, the fact that *A* ultimately was defeated does not establish that his original refusal to settle on *B*'s terms was blameworthy. In many cases, the outcome of litigation is not clearly predictable. In other cases, *A* may be defeated because of a change in the law or a determinative fact which was unknown to him until proven at trial.

That the loser's refusal to recognize the validity of the winner's position does not always reflect wrongful conduct is recognized even in countries which utilize the indemnity system.¹¹ On the other hand,

¹¹ See notes 102 and 104 *infra*.

in extreme situations, it is clear that *A*'s conduct is fairly characterized as untoward. Even now, absent the indemnity system, some American jurisdictions consider *A*'s conduct to be tortious and award *B* damages in a separate action, if it can be proven that *A* was "malicious" in bringing a lawsuit.¹²

In the overwhelming majority of cases, which lie between proven malice and total surprise due to an unknown fact or a change of law, it is not clear when *A*'s conduct might be considered sufficiently derelict to trigger liability for the real expenses of litigation. Arguably, the "reasonableness" standard of culpability in tort law could be applied. *A* would be viewed as a wrongdoer whenever his refusal to settle or his instituting a lawsuit constituted conduct which a "reasonable man" would not have undertaken. The key element in determining *A*'s reasonableness would be the predictability of the outcome—a clear analogue to the traditional tort concept of foreseeability.¹³ Depending on how predictable *B*'s ultimate victory should have been to *A* before the trial, the argument for treating *A* as a wrongdoer is more or less compelling.¹⁴

These difficulties of prediction could be avoided if indemnity were awarded against the loser in all situations on the theory that he is more often a wrongdoer than not, and that the process of determining case by case whether he is a wrongdoer is unworkable or itself too expensive.¹⁵ The proposition that a majority of defeated litigants have litigated improvidently is questionable.

The reason a case by case adjudication of whether a defeated litigant is a wrongdoer would be difficult is also the reason the proposition that

¹² See W. PROSSER, *LAW OF TORTS* § 114 (3d ed. 1964). This remedy is applied more frequently to bad faith plaintiffs than to bad faith defendants. The tort does not exist in England, because courts have held that indemnity provides a sufficient remedy.

¹³ This would be a difficult test to formulate. A "reasonable man" would, of course, want to know whether he would be compelled to pay indemnity, before deciding whether to litigate. Probably, the same test could be followed as in determining negligence—likelihood of harm (here, the likelihood of defeat) times extent of harm (the cost of the trial) versus the likelihood of victory times the extent of the gain (the amount a victory would have improved the litigant's position—i.e., the amount it would have exceeded the defendant's highest offer or been below the plaintiff's lowest demand). See *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947). The other elements in the equation (cost of trial and extent of gain) would be relatively easy to determine. But determining what a reasonable man would have predicted his odds of success were would be an extremely difficult process.

¹⁴ Most exceptions to the general rule of indemnity in other countries and many of the exceptions to the general rule of no-indemnity in the United States seem to be based on this principle. See, e.g., note 102 *infra*.

¹⁵ See, Ehrenzweig, 54 CALIF. L. REV., *supra* note 1, at 797.

a majority of defeated litigants is hard to substantiate. There are simply no clear standards for determining what constitutes a "wrong" in refusing to settle on *B*'s terms. Secondly, even under the American system, *A* is presently damaged by losing the lawsuit (he has to pay his own attorney);¹⁶ it would seem unlikely that, realizing this, he would have continued the litigation unless he calculates his chances of winning and considered them at least promising enough to be worth the risk of his own attorney's fees.¹⁷

There is another rationale for indemnifying a successful plaintiff at the expense of a defeated defendant. By hypothesis, the defendant in the transaction or occurrence which is the subject of the suit wronged the plaintiff even before the lawsuit was commenced.¹⁸ The plaintiff's litigation expenses are arguably the foreseeable results of the defendant's original wrong.¹⁹ Only through indemnity is a tort plaintiff "made whole" or a contract plaintiff put in the position he would have been in had the contract been fulfilled. In terms of strict foreseeability, this rationale is persuasive. Very few results of wrongful conduct are more foreseeable than that the wronged party will sue and thereby incur legal expenses.

Most commentators have assumed that indemnity would further "justice" largely because it appears to make the allocation of litigation expenses consistent with the substantive rules for resolving lawsuits. Even this argument is questionable. A successful defendant justly deserves indemnity only when the plaintiff's conduct in bringing the lawsuit is somehow "wrongful." Successful plaintiffs are a more compelling case for the justice of indemnity. On the other hand, there may be other policy considerations that would render the extension of the substantive standards of justice to litigation expenses undesirable. If so, perhaps the same standard of wrongfulness in the process of the litigation itself should be required before a defeated defendant is compelled to indemnify his opponent, which is the law at present as embodied in the tort doctrine of malicious prosecution.

¹⁶ Of course, if *A* is a plaintiff whose attorney is on a contingent fee, *A* incurs no attorney's fee by losing the lawsuit. In that case, however, it is likely that the attorney has made a judgment that there is some merit in *A*'s claim. The contingent fee attorney's refusal to accept a worthless case can act as an independent check on meritless litigation. See R. HUNTING & G. NEUWIRTH, WHO SUES IN NEW YORK CITY? A STUDY OF AUTOMOBILE ACCIDENT CLAIMS 51 (1962); F. MACKINNON, CONTINGENT FEES FOR LEGAL SERVICES 206 (1964).

¹⁷ The test suggested above, see note 13 *supra*, would turn on whether his chances of winning were worth the total cost of the trial.

¹⁸ This rationale would not support the proposition that a successful defendant should be indemnified at the expense of a defeated plaintiff.

¹⁹ The plaintiff never would have litigated but for the defendant's original wrong.

B. Effect of Indemnity on the Behavior of Litigants

1. Impact on the Decision Whether to Litigate

Many of the arguments concerning the merits of the indemnity system are based on assumptions relating to the effects that indemnification of all successful litigants would have on the decision of prospective parties to litigate or to settle out of court. These assumptions are often buttressed by generalizations about behavioral patterns or by comparisons between the United States and countries utilizing the indemnity system.²⁰

The charts in the appendix of this article show that—all other things being equal—indemnity would seem to encourage a party to offer less or demand more when he feels he has a better than even chance of success, discourages it when he feels his chance of success is less than even, and has no effect when he feels that the chance is even. Thus, if each party feels he has a better than even chance of success, indemnity will discourage pre-trial settlement by encouraging plaintiffs to demand more and defendants to offer less.

These charts, however, are subject to two important qualifications. First, by focusing on the effects of indemnity alone, they ignore a number of other factors which influence a potential litigant's behavior—varying attorney's fees,²¹ the solvency of the plaintiff,²² the general economic positions of the litigants,²³ contingent attorney's fees,²⁴ possible disagreement over the amount of damages,²⁵ and the influence of the attorney.²⁶ The second qualification is that probable odds of success may not be accurately perceived by a litigant; if they were, ra-

²⁰ See, e.g., Greenberger, *supra* note 3.

²¹ A given case may be more expensive for one of the parties. In that situation, the party for whom litigation is more expensive would be at a disadvantage, if there were no indemnity. An example of this might be an individual suing an institutional litigant with a permanent legal staff.

²² If the plaintiff is judgment-proof, he will not have to pay indemnity and may actually be in a stronger position during settlement negotiations. In the unlikely event that the defendant is judgment-proof (if he were, the plaintiff would have little to gain by suing him), he would have a similar advantage.

²³ A poorer litigant might fear indemnity more than his wealthy opponent, and therefore be willing to settle on his opponent's terms.

²⁴ The chart assumes a set fee. Contingent fees may make a plaintiff more willing to risk defeat. See generally F. MacKINNON, *supra* note 16.

²⁵ The chart assumes that if defendant is found liable, the damages will be a certain amount. In fact, many cases are litigated because the parties disagree over the amount of the damages.

²⁶ A contingent fee attorney may influence his client to settle earlier or may refuse to accept the case at all if the chances of recovery are slight, F. MacKINNON, *supra* note 16, at 198, 201.

tional litigants would always settle.²⁷ The litigated case most often is one in which the parties have differing estimates of the probable chance and size of a recovery.²⁸ In such a case, indemnity might reinforce the parties' positions and place their estimates of a fair settlement value even further apart.²⁹

On the other hand, indemnity would seem to have at least some litigation-detering effects. All litigants, especially plaintiffs of modest means,³⁰ would ponder their chance of victory much more carefully than at present. Exactly what result this would have is unclear.³¹ The charts do not prove, or even tend to prove, the validity of any generalizations about the *net* impact of indemnity on the behavior of litigants. They do serve to suggest the complex variety of factors that must be taken into account. They also demonstrate that, logically, there seems to be no reason for the view that indemnity alone would discourage litigation. The only litigants who would be demonstrably encouraged to settle by indemnity are those who believe that they have less than an even chance of success. Of course, prospective litigants may react irrationally to indemnity,³² but only to the extent that this can be proved do those who argue that indemnity would discourage litigation have some basis for their position.

In determining the impact of indemnity on the behavior of prospective litigants, the comparative analysis currently available adds little to behavioral analysis. Other factors contribute to the large volume of litigation in American courts. For example, the United Kingdom's legal system, a frequent reference for proponents of indemnity,³³ may be distinguished by too many other factors to make any comparison with the American scheme probative of the relation between indemnity and the behavior of litigants. In America, the court system is supported out of general revenue as an essentially free service to those citizens who desire to litigate rather than by court fees taxed to liti-

²⁷ They would thereby save the expenditure of attorney's fees under either system.

²⁸ See generally, Rosenberg & Sovern, *Delay and the Dynamics of Personal Injury Litigation*, 59 COLUM. L. REV. 1115, 1124-25 (1959).

²⁹ If each party thought he had a better than even chance of success, indemnity would encourage both parties to litigate rather than settle.

³⁰ Presently, defeated plaintiffs lose nothing if they have an attorney on a contingent fee basis.

³¹ It might, of course, influence more prospective litigants to go to court in the hope of receiving indemnity.

³² It is more often assumed that litigants would react by settling out of court due to their disproportionate fear of having to pay indemnity. It is arguably as likely that they would go to court more often due to a disproportionate hope of receiving indemnity. Neither position has any basis in proof.

³³ See, e.g., note 3 *supra*.

gants.³⁴ In the United Kingdom, the court system was at one time profit-making,³⁵ and is still largely supported by court fees rather than by general revenue.³⁶ Comparatively, then, litigation is attractive in the United States.³⁷ The American contingent fee, illegal as champertous in the United Kingdom, also may make litigation comparatively attractive.³⁸ Thus, even without examining the substantive law of the two countries to ascertain whether there are differences in the predictability of various types of cases,³⁹ it is clear that there is insufficient evidence to isolate indemnity as the crucial factor in discouraging litigation in the United Kingdom.

a. A Forum for Small Claims

Proponents of indemnity have argued that the present American system makes justice inaccessible to plaintiffs with claims of small monetary value, because, even if successful, the plaintiff has little or no net recovery after paying legal expenses. Indemnity would arguably remedy this, and would thereby also strengthen the position of a small claims plaintiff at pre-trial negotiations.⁴⁰ There seems to be real validity to the argument. Plaintiffs with strong small claims against defendants who realize that they are definitely or probably liable would be greatly aided by indemnity. Under the present system, the plaintiff is often forced to settle for less than the amount that both parties realize he could get in court; under indemnity, he could insist on his full recovery or litigate and receive it.

On the other hand, plaintiffs with merely colorable small claims against defendants who do not consider themselves liable would not uniformly benefit from indemnity. Indemnity would encourage only

³⁴ COUNCIL OF STATE GOVERNMENTS, *THE BOOK OF THE STATES*, 1968-69, at 106 (1968).

³⁵ In 1910, the profit to the State from court fees was over one million pounds. R. JACKSON, *THE MACHINERY OF JUSTICE IN ENGLAND* 293 (1964).

³⁶ *Id.* at 293-94. For a criticism of this feature of English procedure see Gower, *The Cost of Litigation*, 17 *MOD. L. REV.* 1, 23 (1954).

³⁷ High court fees are a surer deterrent to litigation than the indemnity system. The indemnity system is a double-edged sword; a party contemplating litigation is more encouraged by the prospect of victory and more discouraged by the fear of defeat. High court fees cut only one way—their existence (to the extent that they are indemnified) makes defeat more disastrous and (to the extent that they are not indemnified) makes victory less attractive.

³⁸ See FINAL REPORT OF THE COMMISSION ON SUPREME COURT PRACTICE AND PROCEDURE, July, 1953, Cmd. 8878, at 238 [hereinafter cited as *EVERSHED REPORT*].

³⁹ For example, the civil jury and its discretion over damages in personal injury cases may increase litigation in the United States by making it more difficult to predict the result.

⁴⁰ See Ehrenzweig, 54 *CALIF. L. REV.*, *supra* note 1. See also, 80 *HARV. L. REV.* 827 (1967).

those defendants who feel they have less than an even chance of victory to offer more.⁴¹ Only plaintiffs who feel they have more than an even chance of success would be encouraged to litigate, rather than settle.⁴²

On balance, indemnity would probably mean that small, but sure or very strong, claims would be largely settled out of court for the full amount owed. The influence on colorable small claims, however, would be less predictable, depending on the relative strength of the parties' positions in each particular case.

b. Court Congestion

It has also been argued that indemnity would alleviate the court congestion existent in many jurisdictions.⁴³ The premise is that indemnity would deter a sufficient number of prospective litigants (plaintiffs and defendants) from insisting on their day in court to relieve that problem substantially.⁴⁴ As shown above, however, it is by no means clear whether indemnity would generally encourage or discourage litigation. The only cases presently litigated in which the demonstrable effect is a greater likelihood of settlement under indemnity are those between a plaintiff and a defendant, each of whom feels he has less than an even chance of success.⁴⁵ If it can be demonstrated that there are a substantial number of such cases presently litigated, then indemnity would seem to alleviate court congestion unless it would also increase the litigation of other kinds of cases.

Indemnity would discourage pretrial settlement in the situation in which the plaintiff and the defendant each feels he has a better than even chance of success.⁴⁶ Common experience indicates that it is likely that the number of cases of this type is at least as large as the number of cases in which each party feels that he has less than an even chance of success.⁴⁷ As pointed out above, indemnity would almost certainly increase the number of one class of cases that are

⁴¹ See the Appendix.

⁴² See the Appendix.

⁴³ Former Chief Justice Warren has commented on the problem of court congestion: "Interminable and unjustifiable delays in our courts are today compromising the basic legal rights of countless thousands of Americans and, imperceptibly, corroding the very foundations of constitutional government in the United States." 62 L. Soc'y GAZ. 152 (1965). See generally INSTITUTE OF JUDICIAL ADMINISTRATION, STATE TRIAL COURTS OF GENERAL JURISDICTION, CALENDAR STATUS STUDY (1963).

⁴⁴ It has been demonstrated that court congestion is caused by the number of cases actually tried. Rosenberg & Sovern, *supra* note 28 at 1124-25.

⁴⁵ See the appendix.

⁴⁶ See the appendix.

⁴⁷ It would seem sensible to assume that parties to litigation are more likely to overestimate the merits of their respective positions.

clearly discouraged by the present absence of indemnity in the United States—cases involving small amounts.⁴⁸ On balance, there does not appear to be a substantial basis for the argument that adoption of the indemnity system would alleviate court congestion. The foregoing analysis indicates that indemnity in favor of all successful litigants is at least as likely to encourage litigation as to discourage it.

c. Discouraging Colorable Claims and Defenses

Opponents of indemnity assert that litigants with doubtful or "colorable" claims or defenses would be unduly intimidated by the prospect of having to pay their opponents' expenses in the event of defeat.⁴⁹ The assertion is probably correct with respect to litigants who feel that they have less than an even chance of success.⁵⁰ Litigants with doubtful claims or defenses who feel they have a better than even chance of success would probably be encouraged by indemnity.⁵¹ Of course, it might be argued that a number of litigants who believe that they have a better than even chance of success would react irrationally to the prospect of indemnity and would also be discouraged. There has simply been no demonstration of this.⁵²

An ideal or utopian system for adjudication might encourage litigation of every difference of opinion. But court congestion requires priorities among various types of cases for litigation. The present American system may discourage small claims—regardless of their merits⁵³—and may also discourage those cases in which the plaintiff

⁴⁸ It is clear that small cases are discouraged under the present American system.

It is not hard to understand why the large potential value of a suit should predispose it to reach trial. The explanation lies in basic economic considerations. If a plaintiff is serious in his estimate that a case is worth about \$50,000 and the defendant is equally convinced that it is worth no more than about \$20,000, neither is likely to give up \$30,000, or even \$15,000, to avoid the expense of a trial. There is enough at stake to make the expense worthwhile. But this plainly is not true if the plaintiff's figure is \$1,000 and the defendant's \$300, however resolute their convictions that their valuations are fair. To be sure, on occasion, the former case may be settled and the second may reach trial, but far more usually the reverse should be true. In the end, cases with large potential are better prospects for trial than others because as a matter of dollars and cents a courtroom trial is an economically feasible way to dispose of them. Rosenberg & Sovern, *supra* note 28, at 1136.

⁴⁹ JUDICIAL COUNCIL OF CALIFORNIA, 18TH BIENNIAL REP. 65 (1961): "The principle of free access to the courts is paramount, and anyone with a slightly colorable claim is to be allowed to assert it without fear of any penalty more severe than that typically imposed on defeated parties." *Id.* See also 53 COLUM. L. REV. 83 (1953).

⁵⁰ See the appendix.

⁵¹ Unless they would react irrationally to the fear of indemnity.

⁵² Litigants could be surveyed to determine how they would react to indemnity.

⁵³ See note 48 *supra*.

cannot wait four or five years to receive his recovery⁵⁴ from being litigated. Thus, even though indemnity may discourage doubtful or colorable claims, rational priority may require their exclusion in favor of those cases which are discouraged under the present American system.⁵⁵

d. Disadvantage to Less Wealthy Litigants

Indemnity might also put the litigant of modest means at a disadvantage in relation to his wealthier opponent. The wealthier litigant would fear indemnity less⁵⁶ and would therefore be in a stronger position during settlement negotiations. Judgment-proof litigants, who would have no fear of indemnity, present special problems that will be dealt with later.⁵⁷ Among solvent litigants, the prospect of being compelled to indemnify attorney's fees would probably be more ominous to a poor litigant. This might have the secondary effect of encouraging a wealthy litigant to inflate his expenses by conducting lengthy depositions to terrorize his less affluent opponent.⁵⁸ There seems to be some indication that indemnity has had this effect in the United Kingdom.⁵⁹

It should be recognized that the absence of indemnity in the United States also creates a disparity among litigants based on wealth. The wealthier litigant is less damaged by having to pay his own attorney than is his opponent.⁶⁰ It is unclear whether indemnity would generally increase this disparity.

2. Impact on Decisions After Litigation is Commenced

Indemnity, when used as a sanction for misuse of legal procedure, may deter dilatory tactics and frivolous motions. In England, for instance, the awarding or the withholding of costs is used to punish a

⁵⁴ For example, the personal injury plaintiff who may be out of work and may incur substantial medical expenses in the interim between the injury and the trial of his case.

⁵⁵ This is the class of litigants who would be discouraged by indemnity.

⁵⁶ Of course, he might also be less impressed by the possibility of receiving it.

⁵⁷ See note 128 *infra*.

⁵⁸ Of course, in the United States, the wealthier party can make litigation a war of attrition by similar tactics.

⁵⁹ The Evershed Report was divided on whether indemnity led to extravagant litigation and thereby impeded the access of poor parties to the courts. EVERSLED REPORT, *supra* note 38, at 236, 246, 337. Recent comment evidences a feeling that the problems of snowballing costs and the consequent inavailability of justice have not been alleviated since the Report in 1953. See R. JACKSON, *supra* note 35, at 304.

⁶⁰ The wealthy litigant has this advantage even against an opponent with a sure claim.

wide variety of procedural abuses: "It is true that under the English system a party is still free to raise a number of technical objections, refuse to admit anything, and force his opponent to prove facts which are not in dispute, but if he does so he will have to pay and pay heavily."⁶¹ Thus, even a winning litigant may be liable to his opponent for the expense caused by his dilatory tactics.⁶²

On the other hand, the granting of indemnity to all successful litigants without exception may actually increase dilatory tactics. The Evershed Commission, for example, disclosed evidence that English indemnity encourages extravagant expenditure. Parties were found to be overcautious due to the win-all or lose-all nature of the proceedings, and due to the possibility of receiving indemnity for at least some of the extravagant expenditures.⁶³

The significant distinction with respect to dilatory and wasteful tactics is between the general practice of indemnifying the winner and the use of costs as a sanction for specific procedural abuses. The former may actually increase extravagant and frivolous procedural tactics; the latter should expedite litigation.

3. *Indemnity by the State*

It is interesting to apply the foregoing analysis to another possible resolution of the problem of allocating the expenses of civil litigation. The state could reimburse the winner for his litigation expenses as a cost of social organization. In the United States, the state already assumes a large portion of the real cost of the adjudicative process by providing a court system largely funded through general revenue. Although some other countries do provide state indemnity to victorious litigants, this solution creates new problems.

First of all, indemnity by the state—unlike indemnity by the losing party—would clearly encourage an increase in litigation. As has been demonstrated, losing-party indemnity acts as a double-edged sword. Prospective litigants are more encouraged by the prospect of victory and more frightened by the fear of defeat when it exists. State indemnity would sweeten the prospect of victory without exacerbating the fear of defeat.

II. GUIDELINES FOR LIMITED INDEMNITY

Arguments concerning blanket adoption of indemnity in America have thus far generated no conclusive answers. Observations of other

⁶¹ See Goodhart, *supra* note 1, at 872.

⁶² *Id.* at 862-71. The nominal "costs" that are awarded in some American jurisdictions have been used as sanctions for procedural abuses—but with little effect because of their monetary insignificance. See 53 COLUM. L. REV. 83, 84-87 (1953).

⁶³ R. JACKSON, *supra* note 35, at 236, 246, 337.

countries indicate that indemnity has "worked"—in the sense that the legal system continues to function—and that indemnity does not seem to change human nature—dilatory tactics continue.

It is certainly not clear whether justice compels the granting of indemnity to all successful plaintiffs and defendants, although the case for successful plaintiffs is strong. The arguments relating to court congestion, small claims, and the discouragement of colorable claims are all essentially based on unsubstantiated inferences of how litigants will behave and on unreasoned assumptions concerning the desirability of encouraging certain classes of claims. The questions relating to the behavior of prospective litigants which underlie these arguments concerning indemnity cannot be answered on the basis of information currently available. More evidence should be assembled concerning the following issues: how most litigants in America presently view their chance of success; how many litigants would be frightened out of court by indemnity; and how many small claims are presently not pressed because of indemnity. In addition, more data should be assembled concerning the behavior of litigants in indemnity countries: are small claims really pressed more often; are many people frightened out of court; and what percentage of cases are settled out of court.

Considering the dangers—increasing the disparity among litigants based on wealth; penalizing unsuccessful, but innocent, plaintiffs; increasing dilatory tactics—and the uncertainty of their magnitude, it is not startling that no American jurisdiction has ventured to adopt indemnity for all successful plaintiffs and defendants.

On the other hand, indemnity is awarded in most American jurisdictions in certain situations. An examination of the operation of these limited indemnity provisions suggests reforms that could be made with a minimal risk of the undesirable consequences attributed to general indemnity.

A. Reimbursing the Private Attorney General

The perception of Louis Brandeis that lawyers litigating cases on behalf of private clients could champion the public interest at the same time has been a recurring theme in the development of reform legislation in the United States. Legislatures have repeatedly created private causes of action to deter conduct perceived as anti-social by the threat of damages⁶⁴ or to encourage use of the injunctive remedy against specific violations of a broadly-defined public policy.⁶⁵ To the

⁶⁴ Clayton Act, § 4, 15 U.S.C. § 15 (1964); Communications Act of 1934, § 206, 47 U.S.C. § 206 (1964); Copyright Act, 17 U.S.C. § 116 (1964).

⁶⁵ See, e.g., Civil Rights Act of 1964, 42 U.S.C. § 2000a *et. seq.* (1964); Clayton Act, 15 U.S.C. § 26 (1964); Copyright Act, 17 U.S.C. § 112 (1964).

extent that encouragement of these public-interest lawsuits is considered desirable, awarding attorney's fees and other expenses of litigation to victorious plaintiffs may be an appropriate measure.

A threshold difficulty in strengthening the plaintiff's hand by extending indemnity into this area is the determination of what constitutes a "public interest lawsuit" or, which litigants qualify as "private attorneys general." Almost every lawsuit furthers both selfish and broadly social goals. The plaintiff under the Public Accommodations Act⁶⁶ furthers a selfish goal by establishing his own right of access to public accommodations; yet, the impact of his success will be broadly social. The successful plaintiff in an automobile negligence action may unwittingly deter careless drivers;⁶⁷ yet, the dominant motive behind his lawsuit can be fairly characterized as selfish. Between these extremes lie many situations in which the relative importance of selfish and broadly social impact is much more difficult to assess. The anti-trust plaintiff, for example, has strong selfish motives and yet may have a considerable impact beyond his own pocketbook.⁶⁸

A superficial approach to this difficult problem is that the judgment that the public dimension of a given cause of action is strong enough to warrant the application of indemnity rests completely with the legislature and that the courts are remitted to a relatively passive role in reimbursing successful public interest plaintiffs. After all, the legislature creates statutory causes of action and should make the judgment about the propriety of indemnity when it enacts the legislation creating the action.

There are a number of reasons why the role of the courts must be more dynamic than this analysis might indicate. First of all, it is often unclear whether the legislature provided for indemnity and, if so, what standard has been established for its imposition. One recent illustration of this lack of clarity and the proper judicial response is the Supreme Court's resolution of *Newman v. Piggie Park Enterprises, Inc.*⁶⁹ The decision, which construed a section of the Civil Rights Act

⁶⁶ Civil Rights Act of 1964, 42 U.S.C. § 2000a et. seq. (1964).

⁶⁷ W. PROSSER, LAW OF TORTS § 2 (3d. ed. 1964).

⁶⁸ ABA ANTITRUST SECTION, ANTITRUST DEVELOPMENTS 1955-1968, at 274 (Supp. 1968). Some awards from specific cases include: *Ohio Valley Elec. Corp. v. General Elec. Co.*, 244 F. Supp. 914 (S.D.N.Y. 1965) (\$16,873,203 after trebling); *Philadelphia Elec. Co. v. Westinghouse Elec. Corp.*, 1964 Trade Cas. ¶ 71,123 (E.D. Pa. 1964) (\$28,972,217 after trebling); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 245 F. Supp. 258 (M.D. Pa. 1965) (\$1,413,203 before trebling).

⁶⁹ 390 U.S. 400 (1968) (per curiam). But see *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967) in which the Supreme Court refused to imply indemnity in the absence of a specific statutory mandate in construing the Lanham Act, 15 U.S.C. § 1117 (1964).

of 1964,⁷⁰ overruled a narrower test laid down by the Court of Appeals for the Fourth Circuit which had required a showing of "bad faith" on the defendant's part to allow a plaintiff to recover attorney's fees.⁷¹ The Supreme Court held that the statute allowing the prevailing party reasonable attorney's fees must be construed to permit successful plaintiffs to "ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."⁷²

The court's decision seems bottomed on two grounds. The policy of the Act is clearly furthered by broadening the opportunity for successful plaintiffs to recover attorney's fees. In addition, had Congress intended merely to provide for indemnity against bad faith defendants, specific reference in the Act to attorney's fees would have been unnecessary. Federal courts already have a general authority to award counsel fees to a successful plaintiff when a defense has been maintained "in bad faith, vexatiously, wantonly, or for oppressive reasons."⁷³

This decision should not only serve to effectuate the Public Accommodations Act, but should also serve as a precedent for construing federal statutes which specifically provide for counsel fees. It should establish a general policy of indemnity with the burden on the loser to show why "special circumstances" would render indemnity unjust in his case.⁷⁴

In addition to approaching statutes with a realization of the desirability of granting indemnity in public interest lawsuits, courts can also grant appropriate remedies in suits at equity by awarding attorney's fees to victorious plaintiffs.⁷⁵ While there will be no attempt here to catalogue completely authorities for this use of the equitable power or the statutes in which Congress or state legislatures have empowered courts to indemnify public interest plaintiffs, both lists are long.⁷⁶

Another difficulty inherent in reimbursing the private attorney general is the problem of mutuality. A common perception of justice may be offended if victorious plaintiffs, but not victorious defendants, are awarded attorney's fees. In fact, the Public Accommodations Act

⁷⁰ Civil Rights Act of 1964, § 204(b), 42 U.S.C. § 2000a-3(b) (1964).

⁷¹ See *Newman v. Piggie Park Enterprises, Inc.*, 377 F.2d 433, 437 (4th Cir. 1967), *aff'd*, 390 U.S. 400 (1968).

⁷² *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968).

⁷³ 6 J. MOORE, *FEDERAL PRACTICE* ¶ 54.77, at 1352 (2d ed. 1966) cited at 390 U.S. 402, n.4.

⁷⁴ See generally 4 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 176 (1969).

⁷⁵ 6 J. MOORE, *FEDERAL PRACTICE* ¶ 54.70, at 1304 (2d ed. 1966).

⁷⁶ See, e.g., *United States v. Bowden*, 182 F.2d 251 (10th Cir. 1950); *McKnight v. Akins*, 192 F.2d 674 (6th Cir. 1951); *Chemical Bank & Trust Co. v. Prudence-Bonds Corp.* 207 F.2d 67 (2d Cir. 1953). See statutes cited note 64 *supra*.

provides for the "prevailing party" to receive attorney's fees,⁷⁷ and, arguably, the standard for indemnity established in *Newman v. Piggie Park Enterprises, Inc.*⁷⁸ may be applied to victorious defendants. Mutuality of indemnity in public interest lawsuits would have some unfortunate results. The plaintiff with a claim that is beset with factual or legal doubts will be made more hesitant to press his claim.⁷⁹ This may deter the "test case" and, in addition, a number of worthy claims under established law. On the other hand, there does seem to be a certain one-sidedness in permitting victorious plaintiffs to recover litigation expenses while leaving victorious defendants empty-handed. Of course, this one-sidedness may be the very objective of creating the public interest lawsuit; placing potential plaintiffs in such an advantageous position may create added pressure on defendants to conform to the substantive terms of the statute.

Another possible resolution of the problem would be to allow the successful plaintiff to be reimbursed by the state.⁸⁰ It is a well-established principle of equity that a plaintiff who successfully sues to benefit a common fund can recover his attorney's fees from the fund.⁸¹ In addition, plaintiffs can often bring a class action under the Federal Rules of Civil Procedure and fund the lawsuit from the recovery of the entire class.⁸² The public-interest plaintiff can, in many cases, be viewed as a private attorney general who has sued to benefit the entire society. Therefore, the recovery of fees from a common fund may be viewed as an argument for state compensation of successful plaintiffs in public interest lawsuits. Recovery of attorney's fees from the state, rather than from the defeated defendant, would lessen although not completely erase objections based on an absence of mutuality.⁸³

The expanded use of indemnity in public interest lawsuits will help promote policies behind the substantive law plaintiffs seek to vindicate. If the principle of indemnity is broadened sufficiently, there could be a significant impact on the legal profession. Public interest law firms,

⁷⁷ Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b) (1964). Cf. *Missouri, Kan. & Tex. Ry. Co. v. Cade*, 233 U.S. 642 (1914) (upholding the constitutionality of a statute providing indemnity for plaintiffs, but not for defendants).

⁷⁸ 390 U.S. 400 (1968).

⁷⁹ For a full analysis see the appendix.

⁸⁰ Cf. Note, *Attorney's Fees in Condemnation Proceedings*, 20 HASTINGS L.J. 694 (1969).

⁸¹ See C. McCORMICK, DAMAGES § 62 (1935).

⁸² See 3A J. MOORE, FEDERAL PRACTICE ¶ 23.07, at 3433 (2d ed. 1966):

Where, through the efforts of the representative of a class, a fund is brought into being or a recovery beneficial to the class is had, the court may allow reimbursement appropriate to the circumstances. *Id.*

⁸³ The successful defendant is still unable to receive any indemnity, and therefore defendants in general may be more willing than plaintiffs to concede close cases before trial.

envisioned by Ralph Nader,⁸⁴ could emerge and receive compensation for their successful litigation. If indemnity were provided for successful lawsuits against the government, a "free-enterprise ombudsman" could receive compensation for ensuring that governmental agencies follow their statutory mandates. Indemnity in favor of the private attorney general would tend to make the vindication of the public interest sufficiently financially rewarding so that it could be feasibly carried out by private practitioners of law.

B. Encouraging the Meek

One of the arguments that is repeatedly made in favor of the adoption of indemnity is that it will encourage certain groups of plaintiffs with small but legitimate claims to assert these claims in court. Under our present system, these potential plaintiffs are deterred from seeking legal redress for their grievances because the expense of retaining counsel may equal or exceed the expected recovery. The unredressed wrongs that result from this system can lead to a pattern of unchecked violation of substantive law and a sense of frustration on the part of those whose legally legitimate claims are "too small" to be given recognition by the legal system as it operates at present.⁸⁵ The impact of a blanket indemnity system on these small, but legitimate, claims has been discussed above.⁸⁶ It may also be possible to encourage the potential plaintiff whose claim is legitimate but too small to warrant

⁸⁴ HARVARD LAW RECORD, Nov. 7, 1968, at 1.

⁸⁵ Some examples of areas of this type are landlord-tenant conflicts, the vendee's right to reimbursement of payments made after repossession in a conditional sale contract, claims against common carriers, nuisances—public and private, usury, suits for wages, the right to vote, and certain actions against public officials. In all of these areas, it is possible for a claimant to have an airtight case and yet be unable to obtain representation because of the small amount involved or be unable to obtain representation without losing a significant slice of his eventual recovery. To a degree, small claims courts, at which the litigant can fairly effectively represent himself, are a solution. But there are certainly a large group of cases that are too large for the small claims courts and yet small enough to be subject to the difficulties described. This is especially true when the arrangement is such as to put the initiative to correct the injustice on the poorer litigant. Landlord-tenant situations are usually of this type as are repossession cases. In the latter, the advantage of the conditional sales contract to the vendor is that upon default all he has to do is repossess and wait to be sued for the payments made—whereas under a normal sale, he would have to sue for the defaulted payments. Until the initiative is reversed, as it was in the Harlem rent-strikes (the burden was shifted from the tenants—having to sue the landlord for better conditions, to the landlord—having to sue the tenant for rent) or the initiative is made less burdensome (as it would be if the plaintiff's counsel fees were reimbursed) the device of shifting the initiative to sue for justice will continue to be a successful method of exploiting the poor. See authority cited note 45, *supra*.

⁸⁶ See text accompanying notes 40-41 *supra*.

the legal expense that pressing it under the present system would entail, by measures short of across-the-boards indemnity.

The first, and perhaps most obvious, method of tailoring a limited indemnity system to correct this deficiency in our present legal structure would be to provide for indemnity in favor of successful plaintiffs who brought claims of less than a certain dollar amount—say one thousand dollars. Oregon has taken this approach to the problem.⁸⁷ This kind of provision—largely because under the American system the amount at issue in a civil lawsuit is usually a function of the plaintiff's imagination—allows the prospective plaintiff to choose whether or not to have indemnity apply to his claim. Thus, the plaintiff may often be faced with a choice between keeping his demand for damages low and thereby coming within the indemnity system and inflating damages in the hope of a higher recovery at the expense of making indemnity inapplicable to his claim. Another possible solution would be to allow a successful plaintiff to receive indemnity whenever the recovery was less than a certain dollar amount—regardless of the dollar amount demanded by the plaintiff in his complaint. This would seem unfair because in many cases in which the dollar recovery is smaller than the demand in the complaint, the disparity is an indication that the defendant's position has been vindicated. It would be unfair, for example, to force a defendant to indemnify a plaintiff who sued him for \$100,000 in an automobile negligence action and recovered only \$500. The defendant may well have agreed on the issue of liability and refused to settle out of court solely because of a disagreement on the amount of damages. Although the final verdict was in favor of the plaintiff, the amount of the recovery may really indicate that the defendant's position has been vindicated.⁸⁸ It would be unfair to penalize the defendant for asserting this legal position. It seems, therefore, that if indemnity is to be based on the amount at issue—that amount should be determined by the amount of damages asserted in the plaintiff's complaint and not by the eventual recovery. A caveat should be added here. In determining what amount constitutes a "small claim" in relation to prevailing legal fees and therefore an appropriate claim for the application of indemnity, it may be dangerous for the legislature to set a statutory sum. It has been argued that one of the reasons that the prevailing system in America is characterized as a "no-indemnity" system is that many legislatures fixed statutory "costs," which at the time of enactment purported to constitute reimbursement for attorney's fees, and neglected to revise the dollar amounts upward

⁸⁷ ORE. REV. STAT. § 20.080 (1965).

⁸⁸ Even countries with blanket indemnity systems might refuse indemnity in this situation. See text accompanying notes 101-04 *infra*.

as inflation made these amounts inadequate.⁸⁹ The same thing could result if a statutory dollar amount was frozen for a long enough time as the amount of a "small" claim in relation to prevailing legal fees. As inflation continued and legal fees rose, the statutory limit could become unreasonably low and many small claims could be excluded from its benefits.⁹⁰ Therefore, it would seem advisable to provide for an automatic yearly revision of the statutory dollar limit based on the cost of living index.

Another method of tailoring indemnity to provide access to the courts for prospective plaintiffs with legitimate claims that are at present precluded is to limit indemnity by a statutory definition of the type of claim asserted. A claim may be defined by the nature of the legal issue involved or by the nature of the defendant. A number of states have adopted statutes of this type. Thus, various statutory provisions permit a recovery of "reasonable attorney's fees" in actions against life or fire insurance companies,⁹¹ claims for unpaid wages,⁹² actions to obtain workmen's compensation,⁹³ and successful defenses on will contests.⁹⁴ In addition, a number of proposed statutes—especially in the consumer protection area—provide for an award of attorney's fees to successful plaintiffs.⁹⁵ It would seem that the factors that should be taken into account in determining which classes of cases are appropriate for indemnity are: whether it is a class of cases in which small claims recur; whether defendants are large institutional litigants who have an inherent bargaining advantage over plaintiffs; whether a large number of the claims are "sure" (i.e., would be settled for the full amount but for the defendant's knowledge that the plaintiff must, at present, pay for his own attorney); the social importance of compelling defendants to conform to the substantive standard of the law (e.g., a strong factor in right-to-vote cases).⁹⁶ This last factor indicates that there may be substantial overlap between the "encouraging the meek" and the "reimbursing the private attorney general" rationales for extending indemnity. Indemnity under the Public Accommodations Act,⁹⁷ for example, can be justified both as furthering

⁸⁹ But see Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 VAND. L. REV. 1216 (1967).

⁹⁰ For example, a claim worth \$2,048 in 1940 was worth only \$860 in 1967. See U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 341 (1968).

⁹¹ See *Germania Fire Ins. Co. v. Bally*, 19 Ariz. 580, 173 P. 1052 (1918).

⁹² See MINN. STAT. § 574.26 (1965).

⁹³ CAL. LABOR CODE § 4903 (West 1955).

⁹⁴ WASH. REV. CODE § 11.24.050 (1967).

⁹⁵ UNIFORM COMMERCIAL CREDIT CODE § 5.203.

⁹⁶ Cf. Comment, *Protecting the Right to Vote: A Model Voter Challenge Statute*, 78 YALE L.J. 662, 689 (1969) (attorney fees in voting rights cases).

⁹⁷ See text accompanying notes 69-73 *supra*.

the public policy of the Act and as encouraging plaintiffs with legitimate, but financially unremunerative, claims to resort to the courts.

A third solution to the problem of the claim which is too "small" to be litigated does not directly involve indemnity, but is worthy of mention here. In many jurisdictions, small claims courts provide a forum for these cases.⁹⁸ For a number of reasons, the existence of small claims courts should not be considered a complete solution to the problem presented by the claim too small to warrant incurring an attorneys' fee under our present system. First of all, in most small claims courts, attorneys are permitted and the party represented by counsel may be at a considerable advantage even under the simplified procedure that applies in these proceedings. Secondly, the jurisdictional limit in most small claims courts is probably too low to include all of the cases in which the cost of retaining counsel effectively deters plaintiffs from suing.⁹⁹ Finally, even if jurisdictional amounts were raised and attorneys were forbidden, the legal profession should question the desirability of removing such a large class of cases from what is traditionally known as the adversary process and the advantages it is supposed to provide to dispute resolution. In order for small claims courts to resolve the problems presented by claims of this type, the legal profession would have to submit to what should be an unacceptable abdication of responsibility. Of course, some small claims are probably too *de minimis* to justify an allocation of admittedly limited legal resources to their vindication, but as far as possible, indemnity, rather than total withdrawal of the legal profession, should be applied to solve the problems presented by the small claim. To the extent that lawyers are permitted to represent clients and are effective at this representation in small claims courts, the same arguments that militate in favor of indemnity in courts of general jurisdiction apply.

An effective application of indemnity to the claims that recur among the poor and to small claims in general may offer a desirable alternative to government financing of free legal services. Because the expense of financing the vindication of these claims would come from the coffers of the wrongdoer rather than out of the pockets of the taxpayers, indemnity would offer a surer deterrent to the primary conduct giving rise to the claims (e.g., violation of a building code, or misrepresentation of credit terms) than would free legal services. In addition, indemnity might allow these claims to be vindicated by an

⁹⁸ TEX. REV. CIV. STAT. ANN. art. 2406a (1964) (jurisdiction limited to claims not exceeding 150 dollars, except that wage, labor, and employment claims are limited to 200 dollars). See, Note, *Small Claims Courts in Texas: Paradise Lost*, 47 TEXAS L. REV. 448 (1969).

⁹⁹ See Note, *Small Claims Courts in Texas: Paradise Lost*, 47 TEXAS L. REV. 448 (1969).

independent bar, a solution which may be preferable to the creation of a new bureauacracy charged with the representation of clients whose claims have been bypassed by the prevailing legal structure. Although indemnity should not be envisioned as a panacea for the legal problems of the poor, limited indemnity is clearly a measure which should be adopted to aid in the vindication of legitimate claims to which legal relief is presently foreclosed.

C. Indemnity Based on the Reasonableness of the Loser's Position

Advocates of the adoption of a comprehensive indemnity system often argue that one of its key virtues will be the deterrence of "unreasonable" or "bad faith" litigation on the part of both plaintiffs and defendants.¹⁰⁰ Although the promotion of this policy may not justify the application of indemnity to every lawsuit, the argument suggests some possibilities for limited indemnity. The difficulty, of course, is in proposing guidelines for the determination of which losers have been "unreasonable"; unless this problem is satisfactorily resolved the application of indemnity may be viewed as capricious, the determination of "unreasonableness" may itself become time-consuming and costly, and the unpredictability of the decision to impose indemnity may corrode the deterrent impact indemnity might otherwise have on prospective "unreasonable" litigants.

The problem of separating the unreasonable from the reasonable loser is one that occurs in even those countries which are popularly considered to have a "blanket" indemnity system. In England, for example, it is within the discretion of the court to refuse to indemnify the winner and even to order the winner to indemnify the loser.¹⁰¹ This discretion has been exercised in cases in which the plaintiff recovers only nominal damages, the defendant offers in settlement and pays into court a greater sum than the plaintiff recovers, or the defendant acts in such a way as to deceptively induce the plaintiff to believe he has a good cause of action.¹⁰²

In Sweden, the loser generally pays the winner's litigation expenses ("costs for preparation and presentation of the action and counsel fees").¹⁰³ An exception exists if, at the time the action was commenced, the loser neither knew nor had reason to know the fact or facts that eventually determined the outcome of the litigation.¹⁰⁴

¹⁰⁰ See text accompanying note 2 *supra*.

¹⁰¹ SUPREME COURT COST RULES 1959 (S.I. 1959 No. 1958) R. 3(2).

¹⁰² See generally, Samuels, *Costs Follow The Event: The Exceptions*, 108 SOL. J. 470, 492 (1964).

¹⁰³ R. GINSBURG & A. BRUZELIUS, *CIVIL PROCEDURE IN SWEDEN* 367 (1965).

¹⁰⁴ Before 1948, an exception was allowed (and each party paid his own expenses) whenever the case was so "obscure and problematical" that the loser had

A different approach has been followed in Germany. The court fees payable to the state and the counsel fees recoverable by the winner are fixed according to a scale based on the amount in controversy (the *Streitwert*). The amount in controversy can generally be reasonably estimated in advance (it is usually simply the amount demanded by the plaintiff in the complaint) and is fixed by the court (in cases of disagreement or when the litigation is not over a monetary demand). If the plaintiff ultimately recovers less than the full amount in controversy, he is the loser of the lawsuit in the proportion of the amount he failed to recover, and can recover counsel fees only in the proportion of his success.¹⁰⁵ The successful operation of this system in Germany is partially the result of its compatibility with more basically substantive characteristics of the German legal system. Part of the reason that a system which fixes counsel fees rigidly and predictably in advance is acceptable is that the amount of work counsel will have to perform on a given case is relatively predictable in advance. The potential conflict of interest between the lawyer and client in fixing the amount at issue¹⁰⁶ exists but is considerably negated by the fact that in Germany the damages awarded are less chimerical than in some other countries and so the scope of the lawyer's imagination in inflating the amount at issue is more tightly strictured.¹⁰⁷

If a cardinal purpose of indemnity is to deter meritless litigation, deterrence is impossible in those cases in which the defeated party had no way of knowing that he would be unsuccessful. In addition, when the defeated litigant is viewed as a wrongdoer, the justice of indemnity is most compelling. The extent of the loser's wrong would seem to be inversely proportional to the reasonableness of his position

cause to litigate. Under the system presently in effect, in 1956 no demand for expense reimbursement was made in 37.7 per cent of the cases decided in the lower courts, reimbursement was awarded in 59.6 per cent of the cases and reimbursement was denied in 2.6 per cent of the cases. *Id.* at 366 n.1. The predictability of the granting of indemnity is unclear. In 95 per cent of the cases in which indemnity was demanded it was granted, but in nearly 40 per cent of all cases (excluding legal aid cases) it was not even demanded. Reimbursement was ordered in favor of plaintiffs in 52.1 per cent of the total number of cases and in favor of defendants in 7.6 per cent of the total number of cases. *Id.* at 367 n.1.

¹⁰⁵ This section is derived from Kaplan, Von Mehren & Schaefer, *Phases of German Civil Procedure* 71 HARV. L. REV. 1193, 1443, 1461-70 (1958) and conversations I have had with Rudolf Schaefer, Judge, Hamburg *Amtsgericht*, Cambridge, Mass., Jan. 1967.

¹⁰⁶ Win or lose, the lawyer's fees increase as the amount at issue increases, but fixing a high amount at issue will make the client liable for a percentage of the costs if his recovery is less than the amount at issue.

¹⁰⁷ Interview with Rudolf Schafer, Judge, Hamburg *Amtsgericht*, Cambridge, Mass., Jan. 1967.

at the outset of the litigation. Thus, notions of both justice and deterring litigants from maintaining unreasonable positions suggest that indemnity is most compelling when the defeated litigant actually realized that his position had no merit, and least compelling when he was justifiably surprised by the result because of a determinative fact unknown to him or a change in the law. Some place between these two extremes, legislatures should draw the line at which indemnity will be granted.

Illinois has a provision that: "Allegations and denials, made without reasonable cause and not in good faith and found to be untrue, shall subject the party pleading them to the payment of reasonable expenses, actually incurred by the other party by reason of the untrue pleading, together with a reasonable attorney's fee, to be summarily taxed by the court at the trial."¹⁰⁸ Courts have been hesitant to exercise the discretion that this statute gives them, because judges are not accustomed to granting indemnity.¹⁰⁹ A more effective provision would cast the burden in the other direction and force the judge to exercise discretion not to indemnify: "indemnity shall be granted unless the trial court shall find" The legal test could remain the same as under the Illinois statute; or be more favorable to indemnity: "good faith"; "reasonableness"; "an absence of (gross) negligence"; "a determinative fact unknown to the defeated party"; or "a change of law." Regardless of the test adopted, forcing the trial judge to make an affirmative decision not to indemnify would probably break down judicial inertia.

Choosing the legal test is a more difficult problem. "Bad faith" is subjective and difficult to prove. Awarding indemnity to all litigants whose opponents were "unreasonable" would provide a more objective test.¹¹⁰ However, this test would present certain disadvantages. A tremendous burden would be put on the trial judge to make this decision without any really clear standards. With a test this vague, there might be considerable litigation over the issue of indemnity itself; and appellate courts might have to establish clearer standards to assure some semblance of uniformity within a jurisdiction. In addi-

¹⁰⁸ ILL. REV. STAT. ch. 110, § 41 (1961).

¹⁰⁹ See 50 ILL. B.J. 800 (1962). For an indication that courts have begun to apply liberally this provision see Levine, *Section 41 of the Civil Procedure Act—The Sleeper Awakes*, 54 ILL. B.J. 388 (1966).

¹¹⁰ "Malice" must be proven to establish the tort of wrongful civil proceedings, but it seems that "malice" may consist of a lack of belief in any possible success of the action and need not involve a motive of ill will. The jury may infer malice from lack of probable cause. W. PROSSER, *LAW OF TORTS* § 114, at 875 (1964). If "bad faith" were interpreted rather liberally, it might evolve into a "reasonable man" test.

tion, litigants would be unable to predict whether indemnity would be applied to their cases and would therefore be less influenced by indemnity in their pre-trial settlement negotiations.

A clearer test, suggested by English experience,¹¹¹ might make indemnity turn on the relation between the judgment, the defendant's highest offer, and the plaintiff's lowest demand.¹¹² If the judgment exceeds the plaintiff's lowest demand or is below the defendant's highest offer, then indemnity would be awarded, respectively to the plaintiff or to the defendant.¹¹³ If the judgment is between the highest offer and the lowest demand, no indemnity would be awarded on the assumption that both parties were "reasonable" or at least equally unreasonable. The trial court would be given discretion to vary this rule in rare cases.¹¹⁴ This would be a clear rule, and it seems peculiarly structured so as to encourage higher offers and lower demands—and, therefore, more pre-trial settlement.¹¹⁵ Its weakness is that it would base indemnity on the relation between the winning litigant's offer or demand and the judgment, and therefore would really make indemnity turn on the reasonableness of the winner's position. To correct this, a factor of two requirements could be added—indemnity would be granted only when the judgment was more than twice the defendant's highest offer (and greater than the plaintiff's lowest demand) or less than half the plaintiff's lowest demand (and less than the defendant's highest offer).¹¹⁶ This would assure that only "unreasonable" litigants—litigants whose pretrial position diverged by a fac-

¹¹¹ If the defendant offers in settlement and pays into court a greater sum than the plaintiff recovers, no indemnity is granted. Samuels, *supra* note 102, at 471.

¹¹² For a suggestion of this type, see Geller, *Unreasonable Refusal to Settle and Calendar Congestion—Suggested Remedy*, ABA SECTION ON INTERNATIONAL AND COMPARATIVE LAW, 1962 PROCEEDINGS 134-42..

¹¹³ Alternatively, the rule could be that if the plaintiff were awarded damages, but below the defendant's offer, no indemnity would be awarded either way. The defendant would receive indemnity only in the event of a defendant's verdict. This is suggested by the systems in England and Sweden. See R. GINSBURG & A. BRUZELIUS, *supra* note 103. Statistics on the frequency of verdicts below the defendant's highest offer in Sweden, England, and the United States might be helpful in making this decision.

¹¹⁴ Certain exceptions should be set forth by statute (e.g., change in law, unknown determinative fact). In addition, the trial court should have discretion to refuse indemnity on the basis of some general standard ("when the loser was reasonable," "when justice so requires").

¹¹⁵ Parties would increase their chances of receiving indemnity by making higher offers or lower demands.

¹¹⁶ This might be even more effective in leading to higher offers and lower demands. A party would not only increase his chances of receiving indemnity, but also decrease his chances of having to pay it, by making a higher offer or a lower demand.

tor of two from the ultimate judgment—would be compelled to indemnify their opponents.¹¹⁷

Presumably, in all the special applications of indemnity a losing defendant would be exonerated if he had offered an amount equal to or greater than the judgment.¹¹⁸ In those cases, however, if the judgment was greater than the defendant's highest offer, the plaintiff would be indemnified, regardless of the relation between the judgment and the plaintiff's lowest demand.¹¹⁹

The limited indemnity provisions discussed above are tailored to correct specific inequities existent in the present adjudicatory system. Their adoption would entail minimal risk of the disadvantages generally attributed to indemnity. In addition, their application would give the legal community more data concerning the operation of indemnity.

It is submitted that a general indemnity scheme somehow based on the reasonableness of the position of the loser deserves further consideration. The foregoing proposal—based on the relation between offer, demand, and judgment and with an option for judicial discretion—should be studied further¹²⁰ and perhaps adopted for a trial period. At any rate, the choice confronting legislatures is not solely between the present system and indemnity for all winning litigants. A number of intermediate measures are possible—some of these would minimize the risk of the disadvantages often attributed to indemnity.

III. INDEMNITY AND OTHER FEATURES OF THE AMERICAN JUDICIAL PROCESS

A. Instructing Juries

American juries may already indemnify some successful plaintiffs by improperly taking account of attorney's fees in their damage awards.¹²¹ No instructions are presently given to juries on this sub-

¹¹⁷ This is an arbitrary standard for determining which litigants are unreasonable—but it could be varied by judicial discretion.

¹¹⁸ This would serve to encourage higher offers, to encourage plaintiffs to accept reasonable offers, and on the general theory that if the verdict is not greater than the defendant's highest offer, the defendant is not really the loser.

¹¹⁹ This would give plaintiffs an added advantage in these special areas (suing institutional litigants, small claims, claims which further a public policy).

¹²⁰ Statistics should be assembled on the frequency of verdicts below the defendant's highest offer and above the plaintiff's lowest demand.

¹²¹ See Kalven, *The Jury, the Law and the Damage Award*, 19 OHIO ST. L.J. 158, 175-78 (1958). This is not within the jury's discretion over damages but is impossible to control. Compare *Renuert Lumber Yard, Inc. v. Levine*, 49 So. 2d 97 (Fla. 1950) (Hobson dissenting):

Moreover, although there is no legal basis for the inclusion of an attorney's fee in the judgment, it is a matter of common knowledge that in

ject, presumably for fear that an instruction not to indemnify might backfire.¹²²

Of course, if it is clear when the jury is instructed that the plaintiff will be indemnified if he is successful, there is no difficulty. The instruction to the jury could simply recite this fact, and the jury would not attempt to indemnify the plaintiff in their award.

Where it is unclear until the jury returns its verdict whether the plaintiff, if successful, will be indemnified, the risk of a double indemnity due to the jury's independent award of legal expenses is present. Instructing the jury on the general operation of the system—for example, that the plaintiff will be indemnified if the judge finds that the defendant was "unreasonable" or if the verdict exceeds the plaintiff's lowest demand—would be of little value. The jury would still have no idea of whether indemnity would actually be granted. Informing the jury of the plaintiff's lowest demand or of whether the judge considers the defendant's position "unreasonable" would be clearly prejudicial. The least objectionable solution is probably that no instruction be given. This may result in a mutual guessing game between the judge and the jury,¹²³ but it is probably less likely to result in prejudice to either party or in an independent award of legal expenses by the jury than is any instruction that could be given.

B. Attorney's Fees

Even in countries which grant indemnity, only "reasonable" attorney's fees are usually allowed. In some countries, notably the United Kingdom, a complex system of rules and a special administrator (the taxing master)¹²⁴ are constituted in order to determine the extent of indemnity in each case.¹²⁵ Determining "reasonable" counsel fees would raise the same problems in the United States as it has raised in some of the countries which have indemnity; fixing the amount of indemnity could itself become an expensive and time-consuming process.

personal injury actions lawyers do not customarily perform services for the plaintiff gratuitously. As a practical proposition, it is indeed probable that after paying for the services of his attorney, appellee would have little, if any of the \$30,000 left Such circumstances cannot be ignored by the writer in performing his part of this appellate court's duty to determine whether the judgment is so grossly excessive as to shock the judicial conscience. *Id.*

¹²² Kalven, *supra* note 121, at 163.

¹²³ The jury would try to guess whether indemnity would be awarded; the judge would try to guess whether the jury acted on the presumption that indemnity would not be awarded and had awarded it.

¹²⁴ See Adams, *The Taxation of Costs*, 59 L. Soc'y GAZ. 323 (1962).

¹²⁵ SUPREME COURT COSTS RULES 28(2).

Most countries with indemnity do not allow contingent fees,¹²⁶ and their use in America raises special difficulties. Preliminarily, there is the question whether indemnity and the contingent fee can coexist. As demonstrated above, indemnity would tend to deter those lawsuits in which a contingent fee is particularly attractive to a prospective plaintiff—suits in which there is a substantial chance of a victory by the defendant. Of course, a contingent fee would still lessen the cost of defeat to a plaintiff by the same amount as it does in the absence of indemnity. In addition, under the limited indemnity provisions discussed above, a prospective plaintiff would not know whether or not defeat would necessarily mean that he would have to indemnify the defendant. On balance, the contingent fee should remain useful after the adoption of limited indemnity. Doubtful claims would still be brought, and plaintiffs would still be attracted by the availability of a device for reducing the expense of a defeat.

Another problem would be determining the liability of a defeated defendant to a plaintiff whose lawyer is on a contingent fee basis. In deciding what constitutes a "reasonable" attorney's fee, it is unclear whether the risk of non-payment that an attorney on a contingent fee assumes should be taken into account.¹²⁷ The extra amount which a successful plaintiff pays a lawyer on a contingent fee can be viewed as a charge for the lawyer's assuming the risk of the plaintiff's defeat. It would seem that the defeated defendant should not have to bear this charge.

C. Security for Costs

In the absence of security for costs, successful defendants will be left unindemnified if the defeated plaintiff is judgment-proof.¹²⁸ Nevertheless, most countries with indemnity do not require plaintiffs to deposit security for costs.¹²⁹ An interesting example is Italy, where attorney's fees are indemnified and Article 98 of the Code of Civil Procedure provided that a plaintiff might be required to post security for costs, if it was feared that a judgment against him would not be covered by his resources. This provision was recently declared viola-

¹²⁶ Kaplan, Von Mehren, & Schaefer, *Phases of German Civil Procedure*, 71 HARV. L. REV. 1193, 1443, 1461-70 (1958) (Germany); Ginsburg, *Civil Procedure—Basic Features of the Swedish System*, 14 AM. J. COMP. LAW, 336, 337 (1965) (Sweden); authority cited note 38 *supra* (England).

¹²⁷ Attorneys on contingent fees generally receive higher fees than their work alone would merit when they win—in order to compensate them for the cases in which they lose and receive nothing. See F. MACKINNON, *supra* note 16, at 182-83.

¹²⁸ Of course, a successful plaintiff would face the same problem if the defeated defendant turned out to be judgment-proof. This is not a very pressing problem because plaintiffs usually would not sue judgment-proof defendants.

¹²⁹ Goodhart, *supra* note 1, at 875 (England).

tive of the Italian Constitution.¹³⁰ Security for costs—when “costs” include attorney’s fees—unduly discriminates against potential litigants of limited means, to whom the adjudicatory system is closed regardless of the validity of their claims. In the United States, such a provision would be clearly undesirable and possibly unconstitutional.¹³¹

Other provisions could be made for defendants who defeat judgment-proof plaintiffs—one of which is indemnity by the state.¹³² On the other hand, if defendants who defeat judgment-proof plaintiffs are left unindemnified, they will be in no worse position than under the present American system.¹³³ At any rate, their plight should not be resolved by requiring security for actual litigation expenses.

IV. CONCLUSION

Indemnity deserves more analysis by the legal community and more action by legislatures. The alternatives open to the concerned legislator are not limited to a maintenance of the present system and the adoption of a blanket indemnity system—such as exists at present in England. In fact, many of the suggestions discussed above for limited indemnity would achieve the objectives that the advocates of blanket indemnity desire to advance. If all of the “limited indemnity” proposals discussed above were adopted, the exceptions to the general “no indemnity” rule that has prevailed in the United States might begin to devour the rule. On the other hand, if more jurisdictions obtain experience with limited indemnity statutes, there will be more evidence available for statistical studies that would indicate the impact of blanket indemnity. In addition, this experience with limited indemnity may dispel some of the fears that cloud the thinking of the Bar on this issue.

¹³⁰ It was held that this provision violated Article 3 (provides that all citizens are equal before the law whatever their economic condition) and Article 24 (provides that everyone may proceed at law for the protection of his rights and legitimate interests) of the Italian Constitution. M. CAPPELLETTI & J. PERILLO, *CIVIL PROCEDURE IN ITALY* 142-43 (1965).

¹³¹ Cf. *Williams v. Shaffer*, 385 U.S. 1037, 1041 (1967) (Douglas & Warren dissenting from a denial of certiorari). See Blood, *Injunction Bonds: Equal Protection for the Indigent*, 11 S. TEX. L.J. 16, 28-31 (1969). But see *Beyerbach v. Juno Oil Co.*, 42 Cal. 2d 11, 265 P.2d 1 (1954) (upholding a California statute which required security for costs in shareholders’ derivative suits).

¹³² In England, the state indemnifies a successful defendant if the plaintiff was enabled to bring his suit through legal aid and if the defendant would suffer “severe financial hardship” by having to pay his own litigation expenses. See 110 SOL. J. 278 (1966).

¹³³ Except for the fact that in pre-trial negotiations, opponents of judgment-proof plaintiffs will have to consider the possibility that they may lose and have to indemnify the plaintiff.

APPENDIX

Chart I Amount at issue = \$20,000

Attorney's fees = \$ 2,000 (for each side)

		American System	Indemnity System
P (plaintiff) wins	P receives (net)	18,000	20,000
	D loses (net)	22,000	24,000
D (defendant) wins	P receives	- 2,000	- 4,000
	D loses	2,000	0
50-50 chance of recovery			
average net recovery for P		8,000	8,000
average net loss for D		12,000	12,000
settlement value		10,000	10,000
75-25 chance of recovery (in favor of P)			
average net recovery for P		13,000	14,000
average net loss for D		17,000	18,000
settlement value		15,000	16,000
25-75 chance of recovery (in favor of D)			
average net recovery for P		3,000	2,000
average net loss for D		7,000	6,000
settlement value		5,000	4,000

Chart II Amount at issue = \$2,000

Attorney's fees = \$2,000 (for each side)

		American System	Indemnity System
P (plaintiff) wins	P receives	0	2,000
	D loses	4,000	6,000
D (defendant) wins	P receives	-2,000	-4,000
	D loses	2,000	0
50-50 chance of recovery			
average recovery for P		-1,000	-1,000
average loss for D		3,000	3,000
settlement value		?	?
75-25 chance of recovery (in favor of P)			
average recovery for P		- 500	500
average loss for D		3,500	4,500
settlement value		?	?
25-75 chance of recovery (in favor of D)			
average recovery for P		-1,500	-2,500
average loss for D		2,500	1,500
settlement value		?	?

"P receives" and "D loses" are the net gain or loss of the respective parties after the attorneys have been paid. The "average recovery" and "average loss" figures are the average recoveries and losses after the attorneys have been paid, if the case were litigated over and over again and P won 50, 75, or 25 per cent of the cases (as stipulated). Settlement value is the sum of P's average recovery and D's average loss, divided by two. Notice that if the parties settle the case

for the settlement value each of them saves \$2,000 under either system (the attorney's expense is not incurred). This would tend to mean that if the parties agree on the chances of recovery and act rationally, they will always settle. Notice also how the indemnity system increases P's average recovery, D's average loss, and the settlement value when P's case is "strong" (75-25 chance of recovery in favor of P) and decreases all of these figures when the claim is "weak" (25-75 chance of recovery in favor of D).

On chart II, no settlement value figures are assigned because it is probably illusory to talk of settlement value when P's average net recovery is a loss. Two things about this chart are striking however. When P has a strong case under the indemnity system, it is at least worth his while to litigate—he will have an average recovery of \$500—while under the American system, if D can "out-bluff" P, P is not really wise to go to court. Under the American system P may still be able to talk D into some kind of a settlement in this situation, because D will lose more in litigation than P will. But if D refuses, P would be unwise to go to court. When P has a weak claim, he is in a similar position to when he has a strong claim under the American system. Litigation will be a losing proposition for P, but D will lose more. This probably explains the phenomenon of the "nuisance value" claim. Under the indemnity system, when P has a weak claim, he stands to lose more in the process of litigation than D.

Senator TUNNEY. Thank you.

Our last witness is Mr. Barry Chase, who is president of the Washington Council of Lawyers.

STATEMENT OF BARRY CHASE, ESQUIRE, PRESIDENT, WASHINGTON COUNCIL OF LAWYERS, WASHINGTON, D.C.

Senator TUNNEY. Mr. Chase, would you be kind enough to summarize your testimony, which will be included in the record in full.

Mr. CHASE. Yes. I would be delighted to, Senator.

Senator TUNNEY. Thank you.

Mr. CHASE. I do have a written summary, which perhaps I could read part of. I think it touches on most of the high points—if I can call them high points—of the prepared statement.

It is the view of the council—and we describe the council's purposes and its membership in our prepared statement—that these hearings are taking place at a time when the funding base presently relied upon by public interest lawyers is particularly precarious and uncertain.

I have attached to my prepared remarks a copy of an article which appeared in the Washington Post on September 28, and which describes the Ford Foundation's current plans to cut off its funding of public interest lawyers practicing in the environmental law field.

It is our understanding that Ford is, unfortunately, not alone in its reluctance to commit itself indefinitely to this type of funding operation; and to the extent that Ford's recent decision represents a general trend away from foundation support of public interest lawyers, the council is most concerned about the continued viability of the entire public interest law movement. In short, it now seems more apparent than ever that, absent some new method of funding, we can no longer safely assume that public interest law will continue as a vital force in this country.

The suggestion for funding which has received most attention during these hearings, and rightly so from our point of view because it is one which we wholeheartedly endorse, is that courts be either permitted or required to award attorneys' fees to public interest litigants at the conclusion of public interest type litigation.

The council does not itself engage in litigation of any type, but we do have many members who are engaged in litigation, and we are very sensitive to the difficulties they face in attempting to litigate without an assured, consistent and ample source of funding. Accordingly, we support the concept of attorneys' fee awards in public interest cases, at least as a partial solution of the problem.

We do not, however, feel that this type of funding vehicle will be sufficient by itself to provide the kind of legal representation that the public interest, or for that matter any other meritorious interest, deserves. Apart from its hit-or-miss and after-the-fact character, the awarding of attorneys' fees at the end of litigation does nothing to finance matters which are not appropriate for litigation, or to cover the preliminary costs of the often massive preparation required before litigation is even instituted, much less resolved.

What the public interest lawyer really needs is a funding device whose support is consistent throughout the representation process and regardless of whether a litigation is instituted or, if instituted, is brought to a successful conclusion. Only in this way can public interest representation be placed on even a roughly equal footing with representation of private interests.

Our suggestion for such a consistent funding vehicle is to increase the dues assessed for lawyer membership in bar associations to an extent which will permit bar associations to establish vehicles for comprehensive funding of public interest lawyers by other lawyers.

In our prepared statement, we outlined the way in which this proposal might operate, specifically with respect to the D.C. Bar, and we noted that it should be possible to provide something on the order of \$3 million per year for the Washington area public interest law movement through the use of such a device.

In our judgment, there is no reason to believe other organizations of the bar in other sections of the country could not follow suit in ways which would assure consistent funding of public interest legal activity on a national basis. At the same time, we recognize that it is possible, particularly for lawyers, to argue against the proposition that members of the bar should in effect tax themselves to assure that public interest law does not disappear from the Nation's conscience nor its courtrooms. Ultimately, it does seem to us, however, that the nature of the adversary system itself, a system by which all lawyers ultimately live, fully justifies the type of funding device which we suggest. That system, after all, is a legitimate method of resolving disputes only to the extent that it provides for equality of representation, not perfect equality perhaps, but at least rough equality.

Moreover, the experience of a couple of bar associations in undertaking small-scale programs of bar-funded public interest law already suggests that our proposal is not only intellectually and morally justified, but also eminently "do-able." In short, if lawyers really believe that vigorous representation of all affected points of view leads to a sound resolution of difficult conflicts, then lawyers themselves should be willing to put a little more of their own money where their professional principles are.

Thank you.

Senator TUNNEY. I am interested in your organization's proposal. Why not make the assessment of the legal profession a function of taxable income rather than a flat rate?

Mr. CHASE. In our prepared statement we mention an average or a median rate of around \$200 for the D.C. Bar. We don't mean by mentioning that figure to indicate that there ought to be a flat assessment. We would be happy to explore the possibility of a system which would depend upon taxable income of the individual lawyer. The problem there is that there may be some serious privacy questions involved. It is somewhat offensive to say to a lawyer, "before I can tell you what your dues are for your right to practice in the District of Columbia next year, you have to tell me how much you made last year." While I might not object to disclosing

that sum in my case, there certainly are people who would object to it. So it might be difficult.

Senator TUNNEY. It is interesting to note that the Beverly Hills Bar Association has done what the Washington Council of Lawyers proposes, and that they have provided money for a foundation which has been active in litigating cases in a number of different areas. Are you familiar with the Beverly Hills experiment?

Mr. CHASE. Yes. There are a number of things about the Beverly Hills program that in all fairness should be regarded as differing from the kind of proposal we make for the D.C. Bar, anyway.

The bar organization in Beverly Hills, which established this public interest law firm—called the Beverly Hills Bar Association Law Foundation—is a voluntary association, so that there is no requirement that lawyers belong to it in order to practice law, in order to pursue their profession.

In the District, we do have a number of voluntary bar associations—I suppose the council is something you might call a voluntary bar association. But we also have a “unified” or “integrated” bar, membership in which is *required* in order for an attorney to practice in the District. We have suggested that it be that vehicle, that involuntary bar, that be given the power to collect enough funds to maintain the public interest law movement in D.C.

There is that distinction, and, of course, there is the further distinction that the Beverly Hills Bar is much smaller and has done this on a much smaller scale—something like 1 percent of the kind of funding we are talking about.

Senator TUNNEY. What kind of support do you have for your proposal?

Mr. CHASE. Well, the support amongst some members of the bar that I have talked to has been notably lacking. There is a sort of visceral reaction against the proposal, which would require—and again this would *require* something, because the bar is not voluntary—an assessment of sorts from lawyers, either depending on their income over the past year or just a flat rate assessment, in order to finance the work of other lawyers.

So we have had objections to the proposal on the basis of “What if I don’t like what Joe is doing over at the center, why should I have to give the unified bar \$200 so they can give him \$15 of it and he can go ahead and sue my clients in what I consider to be a frivolous suit? That is one kind of reaction we have had.

I have a feeling that after a certain amount of discussion and education some of those reactions might be moderated, because, after all, there are many ways in which the public generally, or lawyers generally, pick up the tab for certain things that they might object to.

You explored earlier this morning with the representative of the NAM the ways in which the public in effect picks up half the tab for corporate legal fees. I suppose I could raise an objection to that provision of the code and say why should x amount of my tax dollars be, in effect, paid as a subsidy to certain corporations so they can defend against absolutely meritorious law suits?

I think after a period of education, after a period of discussion within the unified bar itself—and we have not yet proposed this formula to the officers and governors of the unified bar—that with understanding will come somewhat more acceptance of this idea.

Senator TUNNEY. Why should lawyers, not the general taxpayer, finance public interest litigation? After all, the general taxpayer finances corporate litigation to a substantial extent: 50 percent.

Mr. CHASE. We would have no objection to an amendment of the code which would define public interest cases and provide for some kind of tax subsidy or tax deduction in those cases. Our proposal is made on the assumption, first, that that kind of an amendment to law may not be do-able, at least in the near future, and in the absence of general public funding the resource pool to go to is the bar itself. As I mentioned in my prepared remarks and also the summary, lawyers really live by the rule that you have an adversary system because you have committed yourself to the proposition that when adverse interests are represented in a proceeding, you will come out with some kind of "correct" solution. I don't know what kind of standard you use to decide whether a solution you have reached is correct or not, but for whatever reason in the common law countries we give ourselves over to the assumption that that kind of solution will be reached through the adversary system. And if lawyers are the financial beneficiaries of that, then lawyers have the first obligation to make sure that system works.

Senator TUNNEY. Do you believe if court-awarded attorneys' fees were high enough that more attorneys might be prepared to make room for these cases to provide a kind of general counseling you feel is needed?

Mr. CHASE. You have a problem, sort of a "front end" problem. I suppose if you took on one case and starved yourself for a couple of years, and you are a public interest lawyer hoping for a tremendous attorney's fee award at the end of that case, you could use some of the moneys from that to finance your counseling, your representation for the next case. But what if the first three or four of your big cases that you spent 2 or 3 years effort on don't pan out and you don't get the attorney's fee award? Do you fold up and just go away? That is what I worry about, what I would worry about if the attorney's fee award were the only kind of solution to this problem.

Senator TUNNEY. How adequate is the District of Columbia Bar's Government Legal Advice and Referral Service?

Mr. CHASE. That service has not, as I understand it, yet gone into operation. It was put into existence about 3 or 4 weeks ago at a meeting of the Bar's Board of Governors, and, as I understand it, \$30,000 was allocated for the purpose of hiring one attorney whose job would be to give general counseling to Government employees—this includes, by the way, District employees as well as Federal employees—give general advice and counseling as to where people who felt they had been discriminated against could go for help, give them general counseling in terms of exhausting their administrative remedies so they wouldn't run up against a brick wall in going to a lawyer, and referring, in case administrative remedies

don't work, referring that individual to a panel of attorneys who would either volunteer their time on a nonfee basis, or specify that they would serve on some kind of a fee basis.

We just don't have a track record on it, but what I think that experience indicates for the kind of proposal we are talking about is that the Bar already is making judgments on how to allocate dues. I haven't heard any outcry from the same quarters that object to our proposal about the Bar's having allocated dues for a cause we didn't see fit on the last ballot when we voted for the officers of the Bar.

Again, it demonstrates that the bar is able to make those judgments, does have some funds already on which it makes allocations of this sort, and could do so on a broader scale if given the resources.

Senator TUNNEY. I want to thank you very much for giving us your time.

[The testimony resumes at page 1253. Mr. Chase's prepared statement follows:]

TESTIMONY BY BARRY O. CHASE, CHAIRMAN

FUNDING OF PUBLIC INTEREST LEGAL REPRESENTATION

My name is Barry Chase, and I am appearing here today on behalf of the Washington Council of Lawyers to convey the Council's views on the subject of how best to provide permanent funding for public interest legal representation. The Council, of which I am Chairperson, is a three-year old organization of approximately 400 Washington-area lawyers. Many of our members are younger lawyers from large law firms, but we also count among our membership a substantial number of Government attorneys, law school faculty members, private practitioners from smaller or one-lawyer offices and a healthy segment of lawyers from what has come to be known as the public interest bar.

The Council's general purposes are twofold: first, we attempt to keep our members informed of opportunities for public interest and *pro bono publico* involvement of which they might otherwise not be aware. By means of regular luncheons and periodic newsletters, we try to highlight these opportunities and provide a vehicle through which any interested member may pursue them further on his own.

Our second purpose is to develop and take positions as an organization on matters which relate to law and the legal profession. In pursuing this branch of our activities, we have been requested to express our views both on local matters—such as proposed City Council ordinances—and on matters of national interest as well. In the course of these efforts, Council members have testified before our committees and subcommittees of the Congress on such topics as no-fault automobile insurance and the proposed new rules of evidence for the Federal courts.

My appearance here today therefore represents a continuation of the Council's policy of speaking out on issues which intimately affect the way the law works—or fails to work—on behalf of the public generally. In this particular instance however, the questions before this Subcommittee are perhaps more germane to the Council's work than any other issue on which we have previously expressed ourselves. This is so because one major premise on which the Council was founded and operates is that—if given the chance—the legal profession will respond generously to a demonstrable need for the services which it can provide. In our experience, this premise has proved itself to be sound in some cases. But we are also aware that—without some sort of permanent funding base for public interest representation—the response of the bar to needs of this sort is at best a year-to-year proposition which depends more than it should on the generosity of large foundations, the comings and goings of attitudes among lawyers, and the assumption that

someone else will always be willing to make financial sacrifices to meet the collective obligations of the legal community.

As one illustration of the precarious nature of the funding base presently relied upon by public interest lawyers, I refer the Subcommittee to an article which appeared in *The Washington Post* just one week ago today. That article, a copy of which I have attached to my remarks so that it may become part of the record, describes the preliminary decision of the Ford Foundation to reduce its funding of public interest law firms practicing in the environmental field. According to the article, Ford provided nearly one million dollars of funding for five such organizations during the past year, and according to an official of one of these—the National Resources Defense Council—Ford's withdrawal from this role may well mean drastic across-the-board curtailments of public interest law activity in the environmental area.

Thus, the Council recognizes the validity of this Subcommittee's concern that, as a practical matter, the availability and quality of legal representation in public interest cases will remain a doubtful proposition until some means is found to fund the work of public interest lawyers on a permanent basis. Accordingly, the Council would vigorously support the establishment of any doctrine, vehicle or organization which would bring this goal to closer realization.

A suggestion that has already received a good deal of attention during these hearings is that courts be permitted or required to award attorneys' fees whenever a "public interest" litigant emerges victorious at the end of a courtroom struggle. The Council is not the best source of views on this particular funding vehicle because—as indicated by the description of our functions at the outset of this testimony—we do not as an organization engage directly in litigation of any type. To this extent, we differ from other public interest law groups who have a direct stake in whatever proposals may emerge. We do, however, have many members who are deeply involved in public interest litigation, some of which may have been brought to their attention through our efforts. And, in any event, we are very much aware of the difficulties faced by lawyers who wish to devote a substantial portion of their careers to this type of work.

Accordingly, I think it is not too presumptuous of the Council to express to this Subcommittee its enthusiastic support for the concept of making attorneys' fees available to successful public interest litigants. We recognize that there are problems in applying this concept, not the least of which is a workable standard for determining when it is that a litigant can fairly be termed a representative of the "public interest." This type of problem has already been explored during these hearings, and I would add only the opinion that difficulty in working out the details of a concept is rarely a sufficient basis on which to discard that concept from the outset. This is particularly so where the concept is a good one—and the Council most certainly believes that attorneys' fee awards in public interest cases is a good concept.

Our enthusiasm for the attorneys' fee approach should not be taken to indicate, however, that such a change in present practice would by itself be sufficient to assure the kind of legal representation that the public interest deserves. For one thing, it would do little to free lawyers up for representation in the broader sense of comprehensive counselling and advise to public interest clients. Obviously, to the extent that public interest questions do not actually reach the courts, the promise of attorney's fees at the end of a litigation is largely irrelevant. In fact, it could be argued—and has been—that utilizing this device as an exclusive source of funding would tend to encourage unnecessary litigation when an out-of-court settlement might be more appropriate. Second, even in the context of matters that are clearly headed for the courtroom, the ultimate possibility of a fee award is hardly an adequate substitute for the assurance of financial support throughout the process. It is a little bit like Russian roulette to force a lawyer and his public interest clients to make decisions about a case partly on the basis of such a hit-or-miss system of remuneration. It could well be, for instance, that even the most altruistic lawyer would discourage his client from litigating a case in which new land would have to be made in order for the attorney-fee possibility to come through.

To be sure, it would be a great step forward to award fees in successful public interest suits; but what we should really be looking for is a funding device that will permit public interest lawyers to operate on a basis of at least rough equality with their brethren who represent private interests. What we really need, in addition to the award of attorneys' fees, is a device whose support is consistent regardless of whether a litigation is instituted and regardless of whether a litigation which is instituted is ultimately successful. Only in this way can public interest representation—however it is defined—be placed on even a roughly equal footing with representation of private interests.

As the Chairman indicated in his letter of invitation, the Washington Council of Lawyers has a very specific suggestion to make in this regard. It is a suggestion which might be regarded as radical in many quarters but which I believe makes good sense in view of the special nature and obligations of the legal profession and the clear importance of public interest representation.

Our proposal is simply this: that the bar should undertake to tax itself sufficiently to assure permanent funding of public interest representation at a reasonable level. As an example of how this might be done, I use the District of Columbia Bar, membership in which is now required of every lawyer who practices in this jurisdiction. The D.C. Bar has approximately 17,000 members, most of whom are now required to pay dues of \$24.00 per year. This means that the elected officers and Governors of the Bar are already vested with the responsibility of handling hundreds of thousands of dollars annually.

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As further background, it is our understanding that experienced lawyers have an average yearly income in the \$25,000-\$30,000 range on a national basis. Thus, even if the average income of D.C. lawyers does not exceed that of lawyers nationally—an assumption which is probably very short of the mark—D.C. lawyers now contribute less than one-tenth of one percent of their before-tax income to their official professional association. Our suggestion is that this figure should be increased tenfold for lawyers who have been in practice ten years or more and to a lesser extent for less well-established lawyers and others for whom special treatment is warranted.

I hasten to add that the Council is not necessarily locked into this particular magnitude of dues increase. But if an increased dues structure of some sort eventually resulted in an average per-lawyer contribution of \$200 the total annual amount at the D.C. Bar's disposal would be approximately \$3,400,000. Of this amount, something on the order of \$3,000,000 could, we believe, be allocated by a committee of the Bar, or a special foundation established jointly by the Bar and the community at large, to fund a broad range of public-interest representation—not just the "big cases" which make headlines, but also the less visible kinds of representation and counselling which many public interest causes must have.

It is our information that a dollar figure like the one I have just mentioned is on the same order as the amounts which private foundations have been contributing until recently to the Washington-area public interest law movement. But under our scenario, it will be lawyers who see to it that the representation of otherwise unrepresented interests goes forward on

a permanent basis within their own community. Eventually, we would hope, such a program might be instituted nationally to provide funds for legal work which has a peculiarly national orientation.

As you might expect, experience with "floating" this proposal has already indicated some resistance among members of the Bar. Why, we have been asked, should lawyers be required to finance other lawyers when doctors do not finance other doctors, nor plumbers—for that matter—other plumbers. Leaving aside the question whether the omission of other professional groups should be permitted to control what lawyers do, I think there *are* some answers—some "distinguishing factors," as lawyers would put it. First, equality under the law is a principle which is absolutely fundamental to our system of government. The Constitution—at this point anyway—says nothing about equality of food or medical service, but it has been consistently interpreted to require practical, as well as theoretical, equality before the law. However, as experienced lawyers and litigants know all too well, this equality before the law is an empty promise in the absence of effective representation, and effective representation costs money. The second distinguishing factor is the very nature of the adversary system, in which the resolution of difficult conflicts—both large and small—is given over to a process which itself assumes a rough equality of representation for each point of view. In this respect, the legal profession differs from most others; and it is this difference which, in our view, justifies imposing on lawyers obligations which should not necessarily accrue where the adversary element is absent.

Moreover, the collective responsibility of lawyers to see to it that all meritorious causes are represented is itself enshrined in the ABA's Code of Professional Responsibility. Canon 2 states:

"A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available."

One of the Ethical Considerations appended to this canon provides that "Every lawyer should support all efforts to meet this need for legal services." At bottom, our proposal simply recognizes these obligations but takes account of the fact that some lawyers should meet them by means of financial contribution rather than commitment of their own time. In short, if we lawyers really believe that vigorous representation of all relevant points of view leads to an intellectually and practically sound resolution of difficult conflicts, then we ought to be willing to put at least a little of our money—1% or so—where our professional principles are.

So much for the theoretical justification for the type of funding device we have recommended. There remains a very fair question whether the thing will work. For instance, is it realistic to assume that the manner in which the dues money is allocated could ever satisfy a substantial portion of even the public interest bar itself—much less the bar generally. To these types of questions there can be no definitive answers absent some actual experience with the kind of approach which we have suggested. Fortunately, however, we do have somewhat of a track record for such things in the experience of the Beverly Hills, California Bar and—on a more restricted basis—a recent action of the D.C. Bar itself.

In Beverly Hills, the 1800-member voluntary bar association recently voted to increase its dues payments by one-third in order to provide permanent funding for one public interest law firm established by the Bar itself. This firm's mission—like that of other public interest firms throughout the United States—is to provide representation for litigation on behalf of minority groups and other interests which have heretofore not been able to secure such representation. Closer to home from the Council's point of view—if not from the Chairperson's—is a recent initiative of the D.C. Bar itself. The Bar's Board of Governors voted a few weeks ago to set aside \$30,000 to establish a Government Legal Advice and Referral Service. The aim of this new entity will be to provide services to Government employees who feel that they have been discriminated against in the course of their employment. As yet, there is no reason to believe that this new service will be anything less than completely successful. Admittedly, it is on a much smaller scale than what we have suggested, but it does indicate that officials of the Bar are willing and able to make difficult judgments on how to allocate collected dues.

More generally, the Council for its part is confident that a Committee of the Bar, or a panel of distinguished lawyers, judges and ordinary citizens acting as an independent foundation for these purposes, could certainly be entrusted with the task of allocating public-interest monies in ways which would be faithful to the adversary system and responsive to changing needs. Again, while the details of an ultimate structure are surely important, serious exploration of this suggestion should not, in our judgment, have to await the resolution of every potential problem which fertile legal and political imaginations can conceive.

Thank you for your attention, and I will attempt to answer any questions you may have.

[From The Washington Post, September 28, 1973]

ENVIRONMENTAL GROUPS FACE FUND CUT

FORD FOUNDATION CONSIDERS ENDING GRANTS TO FIVE FIRMS

(by Cathe Wolhowe)

The Ford Foundation wants to end its grants to five public interest law firms that have won pioneering decisions in the field of environmental law.

"No formal decision has been made, but yes, we have asked them to investigate other funding sources," Marshall Robinson, vice president of the foundation's Resources and the Environmental Section, said yesterday. "We would like to focus more on environmental research."

He said the foundation will "collaborate" with the office to find money from other sources by 1975. He added the foundation would reconsider funding any firm unable to find adequate funds.

"The conservation issue has gripped society now and we think the public and other private sources will support them," he said.

Most of the firms, however, do not share his optimism.

"If Ford pulls out, there will be a crash in the environmental law market," Roderick Cameron, executive director of the Environmental Defense Fund, said. "I'm sure some will survive, but which ones—I don't know."

The firms, with the amounts they received from Ford last year, are: Center for Law in the Public Interest Los Angeles, \$75,000; Environmental Defense Fund, Washington, D.C., \$120,000; Natural Resources Defense Council, Washington, D.C.; \$365,000; Public Advocates, San Francisco \$275,000, and the Sierra Club Legal Defense Fund, San Francisco, \$49,000.

The proportion of Ford funding in the firms' programs ranges from 12 to 50 per cent.

These groups have won major victories in the courts, many of which were controversial. They have:

- Delayed the construction of the Trans-Alaska pipeline.

- Forced various industries to abide by, and the government to enforce the National Environmental Policy Act and the 1970 Clean Air Amendments.

- Obtained a ban on DDT and predator poisons.

- Forced the Interior Department to give in depth consideration to alternative sources of energy before granting offshore oil leases in the Gulf of Mexico.

"We've been successful," John H. Adams, executive director of the Natural Resources Defense Council, said. "But our success rate is not going to help much in getting sufficient funds if Ford cuts back. Money is hard to come by these days."

He said Ford funds about one-third of the council's budget.

Most of the other firms said they always had known Ford would cut back on its funding at some point, but expressed surprise that it might happen by 1975.

Just last spring, the foundation created a new section, Natural Resources and the Environment, and named Robinson as its head. Environmental lawyers thought this move indicated the foundation would give more emphasis, not less, to the environmental law field. However, they knew the foundation frequently has withdrawn support from programs after they are started.

"Perhaps they've been too controversial," one public interest attorney said. He refused to allow his name to be used for fear his firm would lose foundation support for other activities.

"No question about it—we've stirred up controversy," Cameron said. "But the Ford Foundation has been somewhat independent of politics."

The Ford Foundation was attacked Wednesday in the Watergate hearings by White House aide Patrick J. Buchanan for "unbalancing the political process" toward the Democratic Party.

Asked whether he considered the public interest programs susceptible to criticism for being too politically involved, Robinson responded, "Sure, these programs are political. Anything that is controversial is political. Lots of people's toes get stepped on."

Robinson denied that the change is being made to avoid controversy. "We consider the environment too important not to help keep it live and healthy," he said. "But we need more information so that judgments can be made with adequate data. These issues are complicated."

He said the proposed change would not drastically affect these firms because "much of what they do now is research; they just don't call it that." He added that some of the firms have received large sums from other sources.

But Adams of the Natural Resources Defense Council disagreed.

"Certainly, we must have broad looks at environmental problems," he said. "But then we have to have a way to bring these broad looks into the system and we need the courts to accomplish this part."

Without large grants from Ford, the largest of the foundations, Adams said, the council would have difficulty being assured adequate long-term adequate funding to fight cases that, he said, take years of costly analysis before being finished.

"We get only one chance to present our case in court and we want it represented in a responsible way," he said, adding that expert witness costs for one case can total at least \$100,000.

Cameron expressed similar doubts.

"Ford is the only one with sufficient resources to foot all our bills," he said. "There are small foundations willing to help but no large one like Ford."

CLOSING STATEMENT OF HON. JOHN V. TUNNEY, SENATOR FROM CALIFORNIA, CHAIRMAN, SUBCOMMITTEE ON REPRESENTATION OF CITIZEN INTERESTS

Senator TUNNEY. We have concluded six days of hearings on the subject of legal fees. I think it might be useful to reflect for a moment on what we learned so far.

The premise of these first six days of hearings is that legal fees affect, if not determine, the availability and quality of legal representation. As these hearings began to put flesh and blood on the bare bones of this original premise, it became quite clear, at least to me, that we hit the nail on the head. Economics, both in terms of what consumers can afford to pay and what lawyers can afford to work for, are the nub of the issue.

We began with a look at citizen access to attorneys. We encountered a prevailing notion attorneys are expensive, and a number of cases where attorneys were unavailable or ineffective. We looked at minimum fee schedules, now under attack under the antitrust laws, and saw the impediments they pose to citizen access to attorneys. We looked at two very different Federal programs to regulate, and, in one case, to subsidize attorneys. Under the Black Lung Benefits Act of 1972 and related laws, a few attorneys are growing rich while a number of miners go unrepresented and the taxpayer foots an enormous bill. Under the Veterans' Benefit sections of title 38 of the United States Code, lawyers are prevented from making more than \$10 per claim, and representation of veterans is left to service organizations, with which young veterans have little in

common, or some veterans represent themselves. This is hardly an adequate system.

Finally, in the last days we have viewed in great detail what impact, the mechanism of fee-shifting can have on enabling representation of previously unrepresented interest. There should be, by the time this record closes on November 6, a wealth of information submitted by interested citizens and attorneys on these issues.

Let me close by quoting portions of some of the letters we have received since these hearings began. A distraught woman from Wisconsin writes:

"We have finally found an attorney who charges a straight \$35 per hour plus \$150 per half day court appearance. This is still an outlandish amount of money for anyone who takes home \$121 per week, but I would prefer spending myself into bankruptcy than to sit back and do nothing. It seems that only those who are very wealthy or those who are very poor can afford lawyers. The middle classes certainly cannot. I wonder what will happen when we wake up to find ourselves in a police-state simply because people did not have the money to defend themselves."

A gentleman from California writes:

The plain truth is the majority of us do not have access to justice simply because we cannot afford it.

He concludes:

It cost us \$100 to get an attorney just to learn it was cheaper for us to pay than to stand the suit . . . Legal justice—What in the world is that? It isn't available around here at prices anyone can afford.

I believe that the work of this Subcommittee is now clearly focused. It is going to be important for us as the weeks and months unfold, to develop answers to some of the questions that have been presented.

[The following statements were received for the record:]

PREPARED STATEMENT OF FRANK W. LLOYD, EXECUTIVE DIRECTOR,
CITIZENS COMMUNICATIONS CENTER

I appreciate this opportunity to submit this written statement to the Subcommittee, to complement the comments you heard on the subject of court awards of attorneys' fees to the prevailing party in public interest litigation at your hearings held October 4-5, 1973.

As the Chairman of the Subcommittee stated in his October 31, 1973 letter seeking our comments in this matter, none of the witnesses at that hearing specifically addressed an important related topic—reimbursement of attorneys' fees by federal administrative agencies to counsel representing citizens participating in agency proceedings on behalf of the public interest. My comments will address that specific point.¹

Citizens Communications Center ("Citizens") is a public interest law firm, incorporated as a District of Columbia non-profit corporation in 1971. Citizens provides legal assistance, research and educational services to individuals and community groups seeking to participate in the processes of federal regulation of the communications media. These groups and individuals seek to foster increased responsiveness of broadcasters and cable system operators to the public interest of the communities they serve.

In order to serve these interests, the majority of Citizens' work consists of *pro bono* representation of non-profit groups without adequate economic resources to hire counsel in proceedings before the Federal Communications Commission (F.C.C.). The jurisdiction of federal regulatory matters concerning communications is vested by law almost entirely in the F.C.C., with appeal only to the U.S. Circuit Court of Appeals level.

¹ The supporting legal research contained herein was conducted by Mary Lyndon, a law student intern at Citizens Communications Center.

There is thus virtually no room for parties aggrieved by broadcast and cable violations of the public interest to receive attorneys' fees awarded in litigation before federal district courts, under the circumstances set forth at your hearings by representatives of other public interest law firms. The critical question for these citizens groups and their counsel, therefore, is whether the "private attorney general" and other principles enunciated in many recent court cases awarding legal fees to successful public interest litigants will be applied to the important and far-reaching proceedings of administrative agencies, which deserve equal attention to court proceedings enforcing public rights.

We do not wish to limit the principles of this discussion to citizen participation in the proceedings of the Federal Communications Commission. Since that is the agency with which we are most familiar, we will necessarily be using such proceedings as a paradigm of this phenomenon. But citizen participation in the proceedings of the Federal Trade Commission, the Interstate Commerce Commission, the Federal Power Commission, the Atomic Energy Commission, and the many other federal administrative agencies whose activities directly and vitally affect them is, we are sure, also crucial to the proper functioning of these agencies in the public interest.

The law of standing has been expanded to the point that we are certain that citizen groups would be encouraged to participate in virtually all federal agency proceedings. Thus the real barrier to such participation is not the law of standing, or the lack of public concern, but rather lack of economic resources, particularly to hire effective counsel, on the part of affected citizens.

As to the F.C.C., the law is crystal clear. Citizen participation in Commission proceedings is not only allowed: it is encouraged as absolutely necessary to the proper functioning of the agency's regulatory powers. In *Office of Communication of United Church of Christ v. F.C.C.* 359 F. 2d 994, (D.C. Cir. 1966),² the court ordered the F.C.C. to give full standing to the public in broadcast license renewal proceedings. It noted that participation by responsible citizen groups in the administrative process is essential to the Commission's discharge of its regulatory responsibilities since the Commission's " * * * duties and jurisdiction are vast, and it acknowledges that it cannot begin to monitor or oversee the performance of every one of thousands of licensees." *Id.* at 103. The public, by its actions in policing licensees, is thus performing a function for the understaffed Commission. The court also noted that "some 'audience participation' must be allowed in license renewal proceedings" simply because "consumers are generally among the best vindicators of the public interest." *Id.* at 1005.

In fact, the court in *Church of Christ I* pointed out, members of the public "are the owners of all channels of television—indeed of all broadcasting." *Id.* at 1003. (Emphasis by the court.) The broadcaster is, under the statutory framework of the Communications Act of 1934, a trustee for the public.

Broadcast licensees are granted temporary but triannually renewable franchises to operate on a portion of the airwaves. These valuable franchises are awarded at nominal cost. But the license may continue to hold the license only so long as the operation of his facility serves the "public interest, convenience, and necessity". A licensee acquires no ownership interest in the license. Communications Act of 1934 § 301, 4 U.S.C. § 301. The public retains ownership of the airwaves.

American broadcasting is thus a system wherein the people place one of their scarce and valuable resources under the management of a private broadcaster for his own profit. But the broadcaster's duties continue to run to the owners of the airwaves and he must share the benefits derived from the use of the airwaves with them. This relationship between broadcasters and the listening public, creating sharing arrangements and concomitant rights and obligations, can be scrutinized in terms of some traditional legal concepts, including the law of trusts.

Broadcaster are "fiduciaries * * * of a great public resource and they must meet the highest standard embraced in the public interest concept". *Office of Communication of the United Church of Christ v. F.C.C.*, 425 F. 2d 543, 548 (D.C. Cir. 1969).³ A licensee must "share his frequency with others and

² Hereinafter cited as *Church of Christ I*.

³ Hereinafter *Church of Christ II*.

* * * conduct himself as a proxy or fiduciary" of the public in his use of the airwaves. *Red Lion Broadcasting Company v. F.C.C.*, 395 U.S. 367, 389 (1969) Unfortunately, as the court noted in *United Church of Christ I*, "After nearly five decades of operation, the broadcasting industry does not seem to have grasped the simple fact that a broadcast license is a public trust subject to termination for breach of duty" 359 F. 2d at 1003.

The important and unique nature of this trust was underscored by the Supreme Court in *Red Lion*, *supra*, where the Supreme Court held that it was essentially "the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences * * *" 395 U.S. at 390. Compliance with the public interest requirements of the Communications Act by a broadcaster is an essential prerequisite to the fulfillment of his public trust.

The fiduciary relationship imposed upon trustees obligates them to care for the trust property with diligence and prudence. If misconduct of the trustee, by omission or commission, causes a breach of the fiduciary duty and litigation results, the expenses of that litigation generally must be borne by the trustee. Scott, *Trusts*, Vol. II, § 245 (1956). Where suit is brought to relieve a trustee for misconduct or poor management, costs may be assessed against the trustee.⁴

As "owner" of the airwaves, see Communications Act of 1934, 47 U.S.C. § 301, indeed "of all broadcasting"⁵ citizens who attempt to enforce the rights of the public at the F.C.C. are in the position of corporate shareholders who seek in their own behalf and on behalf of others to protect their ownership. This would also be true in the case of citizen enforcement of public rights to other scarce natural resources, a livable environment, and other interests allocated to private enterprise or regulated for the public benefit by federal administrative agencies. Courts in such cases have held that there is recovery of expenses even where no "pool" of assets results from the action so long as it "confers a substantial benefit on the members of an ascertainable class."⁶ Such actions are "an important means of enforcement" of a statute.⁷

But without a means to ensure that the public has adequate counsel in such proceedings, it is unlikely that sufficient public participation in such proceedings will occur to insure that private interests will act consistently in the broader national and local interest, and that such statutes will be adequately enforced by the federal agencies. To ensure adequate counsel, administrative agencies must be encouraged, through litigation, court decisions, or voluntary action, to approve or award reasonable attorneys' fees at least to successful citizen intervenors in their processes who confer a substantial public benefit through their participation.

There are several situations where the Federal Communications Commission, for example, might approve or order reimbursement of reasonable attorneys' fees to citizen intervenors who do not have an economic interest in the regulatory matter in which they are participating:

1. *Citizen-Broadcaster Agreement Prior to Filing an Objection at the F.C.C.*—In many instances, local citizen groups interested in better communications service sit down to discuss pending license renewal or transfer proceedings with a broadcast licensee in their community prior to the time any formal action is instituted. Often these discussions result in the applicant's agreeing to render some form of improved service to the community. These services might take the form of additional news, public affairs or local programming, direct access for members of the community, or upgraded equal employment hiring at the station.

In some of these instances, the licensee might agree to reimburse the citizen group for its out of pocket expenses and for reasonable attorneys' fees. Ordinarily Citizens or other counsel will have agreed to provide the legal

⁴ *E.g.*, *Wolff v. Calla*, 288 F. Supp. 891 (E.D. Pa. 1968) (trustee must bear litigation expenses where trust property has been mismanaged). *Cf. Wilmington Trust Co. v. Coulter*, 208 A. 2d 677, 683 (Ch. Del. 1965).

⁵ Television Network Program Procurement, H.R. Reg. No. 281, 88th Cong., 1st Sess. 20 (1963).

⁶ *Mills v. Electric Autolite Co.*, 396 U.S. 375, 393 (1970); *Kahan v. Roscnstiel*, 424 F. 2d 161, 166 (3rd Cir. 1970), *cert. denied*, 398 U.S. 950 (1970). *Bosch v. Meeker Co-operative Light and Power Association*, 101 N.W. 2d 423 (S.Ct. Minn. 1960).

⁷ *Mills*, *supra*, 396 U.S. at 396.

services on a no-cost or reimbursement only basis, i.e., if the licensee reimburses the citizen groups then we too will be reimbursed.

These are not the kinds of actions that non-*pro bono* private attorneys normally take, since there is no economic interest to be vindicated. These groups do not have the resources to pay a fee. The interests represented by these groups are generally not vindicated unless no fee or reimbursement only arrangements are possible.

Since reimbursement is a relatively rare phenomenon, and would be at a minimal fee rate in any event, the private bar is not involved in these kinds of activities. In addition, the portion of the private bar expert in communications regulation normally represents broadcasters, and would regard representation of citizen groups attempting to enforce broadcasters' public duties as a conflict of interest. This situation is common to specialized federal agency legal practice in other regulatory areas, as well.

Yet these activities render a clear public benefit in the form of improved service to the community. The agreement for upgraded service between the group and the broadcaster is normally submitted by the broadcaster as part of his application for the renewal or transfer showing his proposed programming and service plans. Commission approval of the agreement requires an affirmative finding that it serves the public interest. If the agreement did not voluntarily provide for fee reimbursement, the Commission could order it after making this finding.

2. *Citizen-Broadcaster Agreement Subsequent to Citizen Filing at the F.C.C.*—After a citizen group formally intervenes in a license transfer or renewal proceeding, but prior to Commission action on the pleadings,⁸ the parties often reach an agreement similar to the one described above. In return for the licensee's pledges of improved service, the citizen intervenor's objections to the approval of the application are withdrawn. As a part of the agreement resolving the dispute, the applicant may agree to reimburse the intervenor its reasonable expenses, including reasonable attorneys' fees, incurred in filing the objections. In that case, the agreement, along with the provisions providing for reimbursement and allowance of attorneys' fees, is submitted to the Commission for its approval. Again, Commission approval of the agreement constitutes a finding that it serves the public interest, and if fees were not included, the Commission could order them.

3. *Citizen-Broadcaster Agreement After Commission Designation of Complaint for Hearing.*—In some situations, the citizen group and the broadcaster do not reach an agreement until after the matter is designated for hearing. Only after the matter is designated does the broadcast applicant agree to provide improved services that form the basis for the citizens to withdraw their objections to the application's grant by the Commission. In this situation, the applicant may again agree to reimburse the intervenor for reasonable expenses including attorneys' fees, and the agreement, including the fee reimbursement provision, would likewise be submitted to the Commission for its approval. Barring voluntary agreement, the Commission could award reasonable counsel fees.

A. F.C.C. APPROVAL OF VOLUNTARY REIMBURSEMENT OF COUNSEL FEES

Prior to March 28, 1972, the Commission took the official view that agreements by a licensee to reimburse expenses of citizens groups—including legal fees—in any of the instances set forth above would be disallowed. On that date, however, the U.S. Court of Appeals for the District of Columbia rendered its third *Office of Communications of United Church of Christ v. F.C.C.* decision,⁹ which held that the policy of section 311(c) of the Communications Act,¹⁰ and the Commission's past approval of reimbursement by

⁸ Under the governing portion of the Communications Act, 47 U.S.C. Section 309(d), a citizen group that intervenes in F.C.C. proceedings is not entitled by right to a hearing on the issues which it raises in the pleadings that are filed. The Commission must first make a determination that the pleadings raise a substantial and material question of fact as to whether a grant of the particular application will serve the public interest. Only if it concludes that the pleadings do raise such a question is the matter designated for a hearing. If no such question is raised, the intervenor's pleadings are dismissed and the application is granted. Appeals from such dismissals may be taken to the United States Court of Appeals for the District of Columbia.

⁹ 465 F.2d 519 (D.C. Cir. 1972) (hereinafter *Church of Christ III*).

¹⁰ Explicitly dealing with withdrawal of a competing applicant for a construction permit for a broadcast station.

one party of expenses incurred by a withdrawing parties *with* an economic interest in the outcome of a F.C.C. proceeding, logically required that it allow similar reimbursement to citizen groups without such a private financial interest in the litigation.

The court found that this holding would further the policy that withdrawal of parties from agency litigation may serve a valid public interest—in this case an agreement that provided substantial improvements in local broadcast service. In addition, it noted that such a decision would facilitate the participation of citizen groups in agency decisions, citing its own prior *Church of Christ* decisions and several decisions in the environmental field to the effect that courts had begun to recognize in recent years “the concept that public participation in decisions which involve the public interest is not only valuable but indispensable * * *.”

It further held that abuses would be protected against since the Commission had to determine that the citizens group was bona fide, the terms of the settlement agreement served the public, and the expenses requested were found to be “legitimate and prudent” in accordance with the standards of Section 311(c) of the Communications Act. It remanded for the latter determination.

Since approving the specific agreement providing for voluntary licensee reimbursement of counsel fees involved in *Church of Christ III*, the Commission has to our knowledge had only one other such agreement presented to it, and that agreement has not yet been ruled upon. Thus there has been no flood of voluntary agreements by licensees providing counsel fees to withdrawing citizen intervenors.¹¹

There are several reasons why voluntary reimbursement is not likely to happen very often, even in light of *Church of Christ III*. On the one hand, the licensee has no motive but his natural generosity to impel him to offer reimbursement, and this motive is more often than not outweighed by the normal business practice not to pay out money where unnecessary. On the other hand, the community group seeking changes in the licensee's policies and practices has generally entered into the renewal process with the purpose of securing improved broadcast service. Consequently, it would be unwilling to sacrifice a significant improvement in service for reimbursement of its costs, and will not press the reimbursement issue as a priority.

Moreover, each time the issue of reimbursement of public interest intervenors has arisen, it has been accompanied by concern on the part of the Commission that public interest gains not be traded off for financial gain. To avoid this possibility and the appearance of it, community groups are constrained not to insist on reimbursement as part of the bargain. After all, it is the Commission which will finally approve or disapprove the agreement. The normal negotiating situation is therefore one in which the only party with a compelling reason to seek reimbursement is also restrained from insisting upon it.

It would be particularly inappropriate for Citizens or other counsel for petitioning citizens groups to urge that the issue of reimbursement of counsel fees be raised at an early stage of the proceedings. An attorney should always be seeking the best result for his or her client, not for himself or herself, and if this issue were raised at an early point, the attorney might be under pressure to, or appear to be willing to, urge the clients to accept a lesser degree of improved public service commitment on the part of a broadcast licensee in order to insure an agreement that provided for the attorney's own reimbursement.

Thus, Citizens' policy to date has been to advise its clients never to raise the issue of counsel fee reimbursement until there is a final agreement between them and a broadcaster on all substantive areas of improved service, and not to make a rejection of counsel fee reimbursement an issue that jeopardizes the benefits to be gained from the agreement. Such a policy is clearly not designed to provide Citizens and other public interest lawyers in this field with a financial source for continued *pro bono* legal activity, but we believe it is our only ethical choice.

¹¹ The Commission in June, 1972 instituted a general rulemaking on “Reimbursement For Legitimate and Prudent Expenses of a Public Interest Group for a Consultancy to a Broadcaster in Certain Instances” (Docket No 19518). Although several broadcasters in their comments seemed to want to use this proceeding to narrow the scope of the *Church of Christ III* decision, this proceeding is not explicitly directed to the question of reimbursement of attorneys' fees in withdrawal of petition to deny contexts.

B. F.C.C. ORDERING OF LICENSE REIMBURSEMENT OF COUNSEL FEES

In each of the situations outlined above in which voluntary reimbursement of counsel fees might be approved by the F.C.C., reimbursement might be ordered by the agency. This is particularly true in cases where, after citizen intervention, the matter has been designated for hearing or the licensee has upgraded its original application to the F.C.C., promising better surveys of community needs, improved programming and/or employment, or remedying other deficiencies in its initial attempt to show its operation of a broadcast frequency would serve the public. But it also applies wherever a citizen-broadcaster agreement is reached, or citizens prevail in F.C.C. litigation.

The designation of a citizen complaint for hearing clearly indicates that there was a *prima facie* question raised as to whether a grant of the application would serve the public interest. Licensee realization that its initial ascertainment or service proposals were deficient and need improvement likewise shows that the complaint was meritorious. In each case it is only because of the public intervenor's action that these matters were called to the Commission's attention.

Further, in all the previous examples, as well as the upgrading situation, it is only in an effort to resolve the objections raised by the intervenors that the applicant agrees to provide improved service, either through a joint agreement with the citizen group or an upgrading amendment to its renewal or transfer application. There is therefore a clear public benefit as a result of the intervention, and the Commission should order that the intervenor be allowed to recover its costs, including attorney's fees.

Were the Commission to order reimbursement of community groups whose challenges have effected service changes that the Commission finds are in the public interest, an entirely different process than now exists would preclude license renewals.

To begin with, there would be no discussion of money exchange at the local level at any point in negotiations. The only issues would be community needs and the licensee's responsiveness to them.

Community groups with substantial complaints would be encouraged to approach a licensee with suggestions for improvement, but those who were not prepared to show that these would serve the public interest would be discouraged. If a group could not make a showing of substantial improvement later, before the Commission, it would have no hope of recovering its costs. The necessity of making a showing of reasonableness and prudence of costs would also discourage delay or nit-picking by community groups.

Moreover, there would be an adjustment in the disparity of financial resources which presently encourage licensees to refuse to deal with dissatisfied segments of their communities and to delay negotiations even when a clearly valid challenge is made. The fact that the meritorious challengers' costs might be borne by the licensee would be reason to keep these costs down by attempting to reach an agreement as soon as possible.

Thus, right from the start the renewal process will be positively affected. The licensee who knows he may have to pay for a challenge to his application will weigh that cost with the price of a thorough ascertainment of community needs and a responsive application. The licensee will be motivated to file an application which will pass muster with both the Commission and the community. He will know that any objection, if valid, will cost him. This same incentive not to deay will operate throughout the renewal proceedings.

The meaning of such a change is far more than the end of a "war of attrition" denying citizen groups a rightful place in F.C.C. proceedings. It would provide savings in personnel time, paperwork, and tax money for the Commission and therefore to the general public.

Finally, these citizens would be able to obtain the assistance of counsel from the beginning of the process of intervention in agency proceedings. Although at present there are only a small number of practitioners, almost exclusively *pro bono* lawyers, in the field of citizen representation before the F.C.C., such a Commission policy might well lead to the creation of a private, self-supporting bar in this area.

The interjection of services of counsel at the beginning stages of citizen intervention in agency processes would have important subsidiary benefits.

Citizens would be advised by counsel not to bring inconsequential complaints before the Commission, but rather only those that clearly showed a broadcaster's failure to live up to its public trust. Actions during agency proceedings that would be regarded as merely inflammatory, harassing or rhetorical would be discouraged by counsel. In fact, rather than increasing the license challenges and the Commission's workload during such challenges, the availability of citizen group counsel might well reduce the aggregate number of such complaints, instituting a self-selecting process that resulted in fewer, more focused, complaints with clear factual and legal substance.

The F.C.C. clearly has the power to order reimbursement of counsel fees under its general equity powers. In 1942, in *National Broadcasting Co. v. United States*, 319 U.S. 190, the Supreme Court stated:

"The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States. To that end Congress endowed the Communications Commission with *comprehensive powers* to promote and realise the vast potentialities of radio. 319 U.S., at 217" (emphasis added).

These "comprehensive powers" have been identified and articulated through the almost 40 years since their original grant both through the actions and experiences of the Commission and through case law. Statutory authority for the developing interpretation of the Commission's powers has been found in specific statutory sections in conjunction the Act's two broad grants of authority to the Commission to take all necessary steps to execute its functions. Section 15 4(i) 47 U.S.C. 154(i); and Section 303(r); 47 U.S.C 303(r).

These two sections have often been cited since *NBC v. U.S.*, *supra*, as bases for expanding Commission action into cable and other non-broadcast areas to keep pace with developing communications technology and operations. The Commission has also relied on these same two grants of power to fashion remedies in situations where the Commission's existing rules do not fully meet its needs.¹²

Courts have often sustained the authority of other agencies to issue orders of a kind ordinarily issued by courts of equity, in spite of lack of specific grants of statutory power.¹³ The F.C.C. has itself ordered divestiture without specific authorization,¹⁴ and has used § 303(r) and the requirements of the public interest to place restrictions and conditions on renewal or grant of license not specifically outlined by statute.

In summary, the F.C.C.'s mandate to protect the "public convenience, interest or necessity" carries with it broad powers to formulate and enforce policies consistent with this mandate. The Commission's jurisdiction extends to all facets of electronic communications which may affect the public interest. Moreover, the Commission is empowered to order remedies that will further its aims in the interest of the public.

In the one case that has been before it on this question, *In Re Application of Radio Station WSNT, Inc.*, 31 F.C.C. 2d 1080 (1971) (WSNT) the Commission stated that ordering reimbursement of costs, including counsel fees of a citizens group petitioning to deny a license, following agreement and withdrawal after designation for hearing, would be "inappropriate." It did not, however, assert that it lacked authority to compel reimbursement.¹⁵

Agency reimbursement is not without precedent. The FTC has reimbursed successful citizen intervenors' costs (attendance fees; mileage and subsist-

¹² See, e.g., *Midwest Television, Inc.*, 8 R.R. 2d 278, 291 (1966); *United States v. Southwestern Cable Co.*, 392 U.S. 157, at 180, 181 (1968).

¹³ See, e.g., *Pan American World Airways v. United States*, 371 U.S. 296 (1962), *Gilbertville Trucking Co. v. United States*, 371 U.S. 115, 129-30 (1962).

¹⁴ *Metropolitan Television Co. v. F.C.C.*, 289 F.2d 874 (1961).

¹⁵ Citizens served as counsel to the local citizen group intervenor in the WSNT case. Following the decision in *United Church of Christ III*, the Commission requested a remand of this case for reconsideration in light of the court's ruling there, and it is still pending before the Commission. Another public interest law firm is representing Citizens before the Commission in this case. Nothing in our comments are addressed, nor should they be construed to be addressed, to the question whether attorneys' fees should be awarded in this particular case. Our comments have been sought by this Committee to assist in understanding the general question of agency-awarded or approved legal fees, and my comments are addressed solely to that point.

ence expenses of witnesses or deponents, traveling and related expenses of attorneys and traveling and subsistence expenses of the indigent respondent), after intervenors, a group of George Washington University law students interested in consumer practices, had been granted leave to proceed in forma pauperis and had been successful in a false advertising case. *In the Matter of the Firestone Tire & Rubber Co.*, Docket No. 8818, November 3, 1972.

The FTC took this action after seeking and receiving advice from Elmer Staats, the Comptroller General, regarding agency power to reimburse the student group. The Comptroller's analysis of the FTC's duties and powers has far reaching implications for other agencies. In his letter responding to inquiry by Myles Kirkpatrick, Chairman of the FTC, Staats wrote:

"The entire thrust of the *American Chinchilla Corp.*¹⁶ decision is that a respondent has the basic right to prepare and present his case on a level substantially equal to that of his opposition, and that his right may not be abridged solely because the respondent lacks the required funds." Staats pointed out that the appropriations of the FTC are normally available for "necessary expenses;" the determination of what constitutes "necessary expenses" is within the reasonable discretion of the Commission. The letter concludes,

"* * * Thus, if the Commission determines it necessary to allow a person to intervene in order to properly dispose of a matter before it, the Commission has authority to do so. As in the case of an indigent respondent, and for the same reasons, appropriated funds of the Commission would be available to ensure proper case preparation."¹⁷

Citizens participating before the F.C.C. in contrast to the intervenors in the *Firestone* case, may want to request not only costs, but also attorneys' fees. And they have not yet asked the F.C.C. to pay their expenses from its own limited resources. They have rather suggested, at least initially, the more efficiently and equitable remedy of payment by the broadcaster who has benefited from their intervention.

There are compelling reasons for the F.C.C.'s ordering reimbursement by licensees in the citizen intervention context, reflecting not only equitable concerns but also basic policies underlying the Communications Act. Government allocation and regulation of the airwaves are necessary to preserve an orderly broadcast system. Under Congressional compulsion, the Commission has recently recognized that the regulation of the broadcast media should pay for itself. See *Schedule of Fees*, F.C.C. 70-694, 35 F. Reg. 10988, 10989 (1970). A legitimate part of the cost of such regulation is the cost of policing the broadcast media to insure their compliance with the public interest standard.

The Communications Act and the Commission have delegated much of the enforcement burden to the public. The public's cost in carrying out this burden is thus a direct cost of regulating broadcasting. As the Conference Committee on the Independent Office Appropriations Bill, 1970,¹⁸ stated.

"the taxpayers * * * [should] not be required to bear any part of the [regulatory expense] load in view of the profits regulated by the agency."¹⁹

Broadcasters have greatly profited financially from the public. Yet the structure of broadcasting reflects its own institutional (as well as intentional) discrimination against the unrepresented, the minorities, the impoverished, and the disenfranchised. The Communications Act and the Commission shift the responsibility for remedying these defects to the public. When taken with the Congressional and Commission philosophy that regulatory activities should, insofar as possible, pay their own way, the Act commands that the public be allowed to be reimbursed for its expenses in enforcing a statutory mandate.

Thus the Commission has the power to order reimbursement in furtherance of its comprehensive powers over the communications systems of the United States, and a mandate from the basic enforcement scheme of the Act and

¹⁶ In *American Chinchilla Corp.*, Trade Reg. Rep. ¶ 19,059 at 21, 323 (1970) the Federal Trade Commission held that elemental fairness and due process in administrative procedures compel the FTC to insure availability of counsel for indigent respondents.

¹⁷ The full text of both the Kirkpatrick and Staats' letters are reprinted, with comments by Senator Kennedy, in the *Congressional Record*, S. 13238-40 (August 10, 1972).

¹⁸ House Report 91-649, November 18, 1969, page 8.

¹⁹ *Schedule of Fees*, F.C.C. 70-694, 35 F. Reg. 10988 (1970).

court decisions, which delegate much of the burden to public intervenors. As to the latter point, it has the support of the recent court decisions such as *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972) often cited in testimony of others before this Subcommittee, dealing with the expanding "private attorney general" rule.

This rule, as succinctly stated by the court in *La Raza Unida*, holds:

"* * * [W]henever there is nothing in a statutory scheme which might be interpreted as precluding it, a "private attorney general" should be awarded attorneys' fees when he has effectuated a strong congressional policy which has benefited a large class of people, and where further the necessity and financial burden of private enforcement are such as to make the award essential." 57 F.R.D. at 98."

We will not repeat all of the other decisions complementing *La Raza Unida* and supporting the same point. All of them deal with a principle that is equally applicable to the actions of "private attorneys general" who "effectuate a strong congressional policy" in proceedings before administrative agencies that have "benefited a large class of people." In administrative agency litigation by citizens groups, as well as court litigation brought by them, the "necessity and financial burden of private enforcement" makes awards of attorney's fees "essential."

The trusteeship principles previously outlined make such private enforcement particularly critical in the F.C.C. context. In F.C.C. litigation, such citizen "attorneys general" represent the public, the beneficiaries of the licensee's stewardship. They intervene to enforce the purpose of the trust and to prevent the licensee, as fiduciary, from realizing illicit profit from practices inconsistent with the purpose of the trust. Meritorious claims are instituted by citizens at their own effort and expense in order to confer a substantial benefit, i.e., broadcast service conforming with the "public interest, convenience and necessity," on the members of an ascertainable "class," the viewers of the station.

The action serves as a deterrent to irresponsible management of the trust and results in a settlement which advances the public interest. As "shareholders" asserting their equity interest against the abuses of management, both the statutory policy and the general law of trusts requires that citizen petitioners in such cases recover their costs, including attorney's fees.

Recently, in *Stone v. F.C.C.*, 466 F.2d 316, 330-32 (D.C. Cir. 1972), the Court of Appeals (on rehearing) cautioned the Commission against allowing the license renewal process to degenerate into "a meaningless exercise, or a never-ending battle for which [public interest groups] have insufficient resources." If this is not to be the case, the principles enunciated in the court cases providing for attorneys' fee awards to successful public interest litigants that your Subcommittee has heard about extensively during its two days of hearings on this subject must begin to be applied to the proceedings of the F.C.C. and other federal agencies.

Although the Subcommittee has asked for our views on this subject, we do not here present any specific legislation designed to deal with this situation. Certainly legislation could be formulated that would deal with this question either through (a) a broad statute with application to awards of attorney's fees in public interest intervention before all federal agencies, or (b) narrowly drawn amendments to the basic statutory mandate of each federal administrative agency in which such intervention was specifically found by Congress to further national rights and policies behind the creation of the agency and the grant of its regulatory powers.

We have argued herein that the F.C.C. already has the inherent statutory authority to order reimbursement of such fees to citizen litigants before it and could do so under standards and safeguards it applies in other cases. This may well be true also of many other administrative agencies. Nevertheless, given past agency inaction in this area, specific action by Congress may be necessary to insure that these agencies recognize the national policy interests furthered by the award of such fees and perhaps to set forth specific guidelines (e.g. defining "reasonable" or "legitimate and prudent" expenses) under which they should be awarded.

If the Subcommittee is interested in pursuing this subject, we will be glad, upon your request, to provide any additional data that you may need

in formulating appropriate legislative actions. We applaud the work of this Subcommittee in raising these critical issues for public discussion and for inviting us to participate in this process.

PREPARED STATEMENT OF C. DALLAS SANDS, PROFESSOR OF LAW,
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After attending the Subcommittee's hearings on this subject on October 4 and 5, 1973, and listening to the statements presented there, I wish to call attention to an aspect of the subject under study which in my judgment deserves greater attention than it appeared to be receiving. Discussions at the hearing related mostly to the idea of using fee shifting in successful public-interest litigation by citizens against establishments, governmental or "private". Although that is an important area of application of the fee-shifting principle to serve public interests, I strongly urge that it represents only a part of the problem and that reforms of a more far-reaching character are needed.

The special reason for awarding attorneys' fees to prevailing citizen-plaintiffs in public-interest litigation is to redress the imbalance that exists between citizens, whether as individuals or in loosely organized interest groups, and organized aggregations of power, whether corporate or governmental, in order to facilitate use of legal remedies to secure relief against exploitation. There is much reason to treat this as a policy objective deserving priority attention under conditions which prevail now in America. But inequality between the weak and the powerful in regard to access to legal remedies in only one of the dysfunctional consequences of a system which puts a price on justice by requiring prevailing parties generally to bear a major part of the cost of achieving legal relief, by paying their own attorneys' fees.

The larger policy with which reform efforts should also be concerned is that of achieving a mature legal system in which damages would be fully compensated, injuries fully redressed at no cost to the injured party, and costs of securing interests by legal remedies borne by those who make resort to legal processes necessary. I submit that no consideration of justice, prudence, or convenience justifies the refusal of the American legal system generally to permit successful litigants to recover attorney's fees from losing parties.

Although there is no presently available means of registering and calculating the consequences of the inability of successful litigants to recoup their attorney's fees, the cumulative effects of this feature of our legal system in countless run-of-the-mill controversies may be greater than its effects in cases which achieve the proportions and publicity of class-action cause celebres against governments or major corporations.

If an automobile sustains \$1000 worth of damage in a traffic accident caused by someone else's fault, it will likely cost the owner no less than \$300 for attorney's fees to collect the \$1000 if he has to sue for it, with the result that the party at fault has still inflicted a \$300 loss on the automobile owner for which the legal system provides no means of recovery. Any negotiated settlement of the claim is likewise apt to be at an amount which discounts the amount of the damage actually sustained by the factor of the non-recoverable cost of the claimant's legal services. If a householder must pursue legal means to protect his interests from a nuisance or a zoning violation on property next door, or if a tenant in an individually owned single family dwelling must take legal action to secure his rights against his landlord, the wrongdoer unjustly imposes on him the expense of legal representation to indicate and secure his rights. It is equally true that in every such case the prosecution of spurious claims unjustly imposes the cost of counsel on defendants. When the influence of non-recoupment of attorney's fees by successful litigants is projected through all of the countless everyday instances such as those cited above as examples, its character as a major fault in our legal system is evident.

A common apology that is heard for not allowing fee-shifting proceeds from an assertion that our legal system is so unreliable that there is really no assurance that the successful party in a lawsuit should, in right and justice, have won it. On that premise, it is said that the legal system should

avoid the risk of adding insult to injury which would result if a wrong decision on the merits were accompanied by a requirement that the hapless loser pay an amount to cover the fee of the undeserving winner's lawyer. This is nonsense. Although of course there are cases about which opinions can reasonably differ as to what is a right decision, the claim that our legal system is generally unreliable remains undocumented. If there are particular matters in relation to which the system can not be counted on to reach consistently right results, the solution lies in reforms calculated to improve the performance of the legal system on those matters, not in perpetuation of the general rule against recoupment of attorneys' fees. Pending reforms to give greater assurance of right decisions about matters with respect to which the legal system may be particularly fallible, the most that would be justified in regard to the question of who bears responsibility for attorney's fees is a discrete exception from a general rule allowing recoupment.

The contingent fee has been touted as a device with which to accommodate the interests of persons who can not afford lawyers. But it is rarely useful except on behalf of persons having claims for substantial amounts of money. It is not generally practical on the defendant's side, nor even on the plaintiff's side in regard to small monetary claims or claims for something other than money. More seriously, however, even where useful the contingent fee does nothing to make the claimant whole since the amount of the fee comes out of the amount of the recovery.

Government funded legal services have been a salutary development in recent times. In the case of persons served in this manner, the need for fee shifting is obviated. But the system of government funding has not gone far to eliminate the need for general reform in regard to fee shifting, nor can it foreseeably be expected to do so. Government funded services have been made available only to a limited portion of the population. To make them uniformly available to all it would be necessary to establish government legal services in every community throughout the nation. Because of the magnitude of costs which that would entail, it is not to be anticipated. Moreover, under guidelines which have prevailed up to now covering access to government legal services, only persons of very limited means have been eligible to use them. Again because of cost considerations, this is not apt to change materially. Yet the cost of legal services may discourage people of moderate means from seeking legal relief in support of just causes. Provision for successful litigants to recoup their attorney's fees would go far toward alleviating the necessity for government funding of legal services, since it would provide the incentive to enable all lawyers to engage in "public interest" practices.

Enlargement of the jurisdiction of small claims courts also is sometimes suggested as a practical remedy for the consequences of the rule against fee shifting. This is probably a desirable thing to do, but for reasons apart from the fee shifting question. Even if by reason of simplified procedures it may be practical to resolve some kinds of disputes in small claims courts without the ministrations of lawyers, if legal questions involved are at all complicated and if one of the parties can afford a lawyer it is unreasonable to assume that the other party would be on equal footing without a lawyer, and the distortions of legal remedies which result from the rule against fee shifting still would obtain. Moreover, even if this were not so and enlargement of the jurisdiction of small claims courts could reasonably be viewed as a *bona fide* partial remedy, it would not go far enough and the major part of the problem would remain.

Suggestions for reform in this area encounter the objection that fee shifting would be difficult to administer because of the necessity for someone to decide what would be a reasonable amount of fees to allow. But decisions of that nature would be no more difficult than many which the courts are regularly called upon to make. Although it would take the time and attention of someone, presumably the judges, to make such decisions, the importance of this task is surely no less than many which judges are called upon to perform. It is sometimes objected that lawyers would not be willing to have their fees determined by a government functionary, but the short answer to this objection is that there is nothing which dictates that re-

forms must take the form of governing the arrangement between a lawyer and his client. Clients can be left free to pay their attorneys whatever they agree upon, which need not bear any correlation with the amount of reasonable attorneys' fees which the client, if successful, would be entitled to collect from the other party.

Suggestions for reform also confront the objection that a rule favoring fee shifting would have a chilling effect on efforts to assert and enforce legal rights because of the risk of liability for the other party's counsel fees when such an effort fails. But even if fee shifting produced greater circumspection in making judgments about whether to pursue legal remedies, that surely would not be clearly for all purposes worse than a system which enables false assertions of legal rights to be made at substantial expense to the other party. There doubtless are situations in which the imbalance of economic or institutional power between parties to a legal controversy, as where the parties are a citizen on one side and the government on a powerful corporation on the other, would have such an inhibiting influence on the weaker party that specific exceptions to a general rule favoring fee shifting, according to which the weaker party would be immune from liability for fees of the powerful one even if he lost on the merits unless it were found that he had prosecuted his claim in bad faith, would be appropriate. But the need for exceptions should not obscure the merit in a general rule favoring fee shifting.

American juridical literature has been overwhelmingly critical of the general rule against fee shifting. Many writers have called for reforms to change the rule, albeit the call has generally been provisional in recognition of a need for empirical research to establish the facts as to what the effects of the present rule are and what the precise nature of the reforms should be.

The design of specific reforms would be greatly facilitated by research to seek answers to the following kinds of questions:

(1) In the case of disputes which reach a stage where an attorney is employed, what does it cost prevailing parties for attorneys' fees?

(2) To what extent does the general rule against fee shifting discourage prosecution of valid claims or defenses because of the expense that would be incurred even if successful?

(3) To what extent does the general rule encourage prosecution of invalid claims or defenses for the purpose of inducing opposite parties to settle for less than the cost of litigation?

(4) Under exceptions to the general rule, does the risk of liability for the other party's fees discourage prosecution of either

(a) Valid claims or defenses, or

(b) Unfounded claims or defenses.

(5) Do exceptions to the general rule encourage settlement of unliquidated money claims in lieu of going to trial over the amount of damages?

(6) Do the answers to (2) through (4) vary according to whether the matter in controversy concerns an interest of substance or a point of principle, and if so, what is the nature of such variation?

(7) In disputes concerning interests of substance, do the answers to (2) through (5) depend on the value of the interest, and if so, in what way?

(8) In disputes over matters of principle, do the answers to (2) through (4) depend on the importance of the principle, and if so, in what way?

(9) Do the answers to (2) through (5) depend on the relative economic strength of the parties, and if so, in what way?

(10) Do the answers to (2) through (5) depend on the relative merit, factual or legal, of the respective parties' positions, and if so, in what way?

STATUTES

TITLE 28.—JUDICIARY AND JUDICIAL PROCEDURE

§ 2412. *Costs.*

Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action. A judgment for costs when taxes against the Government shall, in an amount established by statute or court rule or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by him in the litigation. Payment of a judgment for costs shall be as provided in section 2414 and section 2517 of this title for the payment of judgments against the United States. (June 25, 1948, ch. 636, 62 Stat.—973; July 18, 1966, Pub. L. 89-507, § 1, 80 Stat. 308.)

LEGISLATIVE HISTORY

Reviser's Note.—Based on title 28, U. S. C., 1940 ed., §§ 258, 931 (a) Mar. 3, 1911, ch. 231, § 152, 36 Stat. 1138; Aug. 2, 1946, ch. 753, § 410 (a), 60 Stat. 843).

Section consolidates the last sentence of section 931 (a) of title 28, U. S. C., 1940 ed., with section 258 of said title 28. For other provisions of said section 931 (a), see Distribution Table.

Subsection (a) is new. It follows the well-know common-law rule that a sovereign is not liable for costs unless specific provision for such liability is made by law. This is a corollary to the rule that a sovereign cannot be sued without its consent.

Many enactments of Congress relating to fees and costs contain specific exceptions as to the liability of the United States. (See, for example, section 548 of title 28, U. S. C. 1940 ed.) A uniform rule, embodied in this section, will make such specific exceptions unnecessary.

Subsection (b) incorporates section 258 of title 28, U. S. C., 1940 ed.

Subsection (c) incorporates the costs provisions of section 931 (a) of title 28, U. S. C., 1940 ed.

Words “and for summoning the same,” after “witnesses,” were omitted from subsection (b) as covered by “those actually incurred for witnesses.”

Changes were made in phraseology.

AMENDMENTS

1966—Pub. L. 89-507 empowered a court having jurisdiction to award judgment for costs, except as otherwise specifically provided by statute, to the prevailing party in any action brought by or against the United States or any agency or official of the United States acting in his official capacity, limited the judgment for costs when taxed against the Government to reimbursing in whole or in part the prevailing party for costs incurred by him in the litigation, required the payments of a judgment for costs to be as provided in section 2414 and section 2517 of this title for the payment of judgments against the United States, and eliminated provisions which limited the liability of the United States for fees and costs to those cases in which liability was expressed provided for by Act of Congress, permitted the district court or the Court of Claims, in an action under section 1346(a) or 1491 of this title if the United States put in issue plaintiff's right to recover, to allow costs to the prevailing party from the time of joining such issue, and which authorized the allowance of costs to the successful claimant in an action under section 1346(b) of this title.

PROVIDING FOR OR REQUIRING COURT AWARDS OR
ATTORNEYS FEES

PACKERS AND STOCKYARDS ACT, § 309(F)

TITLE 7.—AGRICULTURE

§ 210. *Proceedings before Secretary for violations generally; action to enforce orders.*

(f) If the defendant does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may within one year of the date of the order file in the district court of the United States for the district in which he resides or in which is located the principal place of business of the defendant or in any State court having general jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the Secretary in the premises. Such suit in the district court shall proceed in all respects like other civil suits for damages except that the findings and orders of the Secretary shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit. (Aug. 15, 1921, ch. § 309, 42 Stat. 165.)

CROSS REFERENCES

Application to certain licensees, see section 218c of this title.

Enforcement by Secretary of Agriculture under this chapter, with respect to activities subject to this chapter, of requirements imposed under section 1601 et seq. of Title 15, Commerce and Trade, see section 1607(a) (6) of Title 15.

Enforcement of liability to individuals for violations, by complaint to Secretary as provided in this section, see section 209 of this title.

FEDERAL RULES OF CIVIL PROCEDURE

Costs, application of Rules of Civil Procedure, see rule 54, Title 28, Appendix, Judiciary and Judicial Procedure.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 202, 209, 211, 218c of this title; title 28 section 2342.

PERISHABLE AGRICULTURE COMMODITIES ACT, § 7(B)

TITLE 7.—AGRICULTURE

§ 499g. *Reparation order.*

(b) *Failure to comply with order of Secretary; suit to enforce liability; order as evidence; costs and fees.*—If any commission merchant, dealer, or broker does not pay the reparation award within the time specified in the Secretary's order, the complainant, or any person for whose benefit such order was made, may within three years of the date of the order file in the district court of the United States for the district in which he resides or in which is located the principal place of business of the commission merchant, dealer, or broker, or in any State court having general jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages and the order of the Secretary in the premises. The orders, writs, and processes of the district courts may in these cases run, be served, and be returnable anywhere in the United States. Such suit in the district court shall proceed in all respects like other civil suits for damages, except that the findings and orders of the Secretary shall be prima-facie evidence of the

facts therein stated, and the petitioner shall not be liable for costs in the district court, nor for costs at any subsequent state of the proceedings, unless they accrue upon his appeal. If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit;

CLAYTON ACT, § 4

TITLE 15.—COMMERCE AND TRADE

§ 15. *Suits by persons injured; amount of recovery.*

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or shall recover threefold the damages by him sustained, and the cost of suit, is found or has an agent, without respect to the amount in controversy, and including a reasonable attorney's fee. (Oct. 15, 1914, ch. 323, § 4, 38 Stat. 731.)

CODIFICATION

Section applies to the provisions of this chapter generally and supersedes two former similar sections enacted by act July 2, 1890, ch. 647, § 7, 26 Stat. 210, and act Aug. 27, 1894, ch. 349, § 77, 28 Stat. 570, each of which were restricted in operation to the particular act cited.

REPEALS

Section 7 of act July 2, 1890, ch. 647, 26 Stat. 210, which was superseded by this section, was repealed by act July 7, 1955, ch. 283, § 3, 69 Stat. 283. For effective date of repeal, see note set out under section 15b of this title.

CROSS REFERENCES

Jurisdiction of civil action or proceeding arising under commerce and anti-trust regulations, see section 1337 of Title 28, Judiciary and Judicial Procedure.

Limitation of action, suspension of, see note under section 16 of this title.

Taxation of amounts received as damages or injuries under this section, see section 1306 of Title 26, Internal Revenue Code.

Venue and service of process in action against corporation, see section 22 of this title.

Venue of district courts, see section 1391 et seq. of Title 28, Judiciary and Judicial Procedure.

FEDERAL RULES OF CIVIL PROCEDURE

Costs, see rule 54, Title 28, Appendix, Judiciary and Judicial Procedure.

Effect of rule 54 on this section, see note by Advisory Committee under rule 54.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 15b, 1012, 1013 of this title; title 7 section 225; title 26 sections 162, 186; title 42 section 2135.

SECURITIES ACT OF 1933, § 11E

TITLE 15.—COMMERCE AND TRADE

§ 77k. *Civil liabilities on account of false registration statement.*

(e) The suit authorized under subsection (a) of this section may be to recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed

of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought: *Provided*, That if the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. In no event shall any underwriter (unless such underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in which all other underwriters similarly situated did not share in proportion to their respective interests in the underwriting) be liable in any suit or as a consequence of suits authorized under subsection (a) of this section for damages in excess of the total price at which the securities underwritten by him and distributed to the public were offered to the public. In any suit under this or any other section of this subchapter the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.

TRUST INDENTURE ACT, § 323(A)

TITLE 15.—COMMERCE AND TRADE

§ 77*www*. *Liability for misleading statements.*

(a) Any person who shall make or cause to be made any statement in any application, report, or document filed with the Commission pursuant to any provisions of this subchapter, or any rule, regulation, or order thereunder, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, or who shall omit to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall be liable to any person (not knowing that such statement was false or misleading or of such omission) who, in reliance upon such statement or omission, shall have purchased or sold a security issued under the indenture to which such application, report, or document relates, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading or of such omission. A person seeking to enforce such liability may sue at law or in equity in any court of competent jurisdiction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit and assess reasonable costs, including reasonable attorneys' fees, against either party litigant, having due regard to the merits and good faith of the suit or defense. No action shall be maintained to enforce any liability created under this section unless brought within one year after the discovery of the facts constituting the cause of action and within three years after such cause of action accrued.

SECURITIES EXCHANGE ACT OF 1934, § 9(E)

TITLE 15.—COMMERCE AND TRADE

§ 78*i*. *Manipulation of security prices.*

(e) Any person who willfully participates in any act or transaction in violation of subsections (a), (b), or (c) of this section, shall be liable to any

person who shall purchase or sell any security at a price which was affected by such act or transaction, and the person so injured may sue in law or in equity in any court of competent jurisdiction to recover the damages sustained as a result of any such act or transaction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant. Every person who becomes liable to make any payment under this subsection may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment. No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation.

SECURITIES EXCHANGE ACT OF 1934, § 18(A)

§ 78r. *Liability for misleading statements.*

(a) Any person who shall make or cause to be made any statement in any application, report, or document filed pursuant to this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading. A person seeking to enforce such liability may sue at law or in equity in any court of competent jurisdiction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant.

TRUTH-IN-LENDING ACT, § 130

TITLE 15.—COMMERCE AND TRADE

§ 1640. *Civil liability—Failure to disclose.*

(a) Except as otherwise provided in this section, any creditor who fails in connection with any consumer credit transaction to disclose to any person any information required under this part to be disclosed to that person is liable to that person in an amount equal to the sum of

(1) twice the amount of the finance charge in connection with the transaction, except that the liability under this paragraph shall not be less than \$100 nor greater than \$1,000; and

(2) in the case of any successful action to enforce the foregoing liability, the costs of the action together with a reasonable attorney's fee as determined by the court.

COPYRIGHT ACT

TITLE 17.—COPYRIGHTS

§ 116. *Costs; attorney's fees.*

In all actions, suits, or proceedings under this title, except when brought by or against the United States or any officer thereof, full costs shall be allowed, and the court may award to the prevailing party a reasonable attorney's fee as part of the costs. (July 30, 1947, ch. 391, 61 Stat. 665.)

CROSS REFERENCES

Action for infringement of copyright, see section 101 of this title.

Costs not taxable against United States, see section 2412 (a) of Title 28, Judiciary and Judicial Procedure, and rule 54 (d) of Federal Rules of Civil Procedure, Title 28, Appendix.

Costs of prosecution taxable in non-capital proceedings, see section 1918 of Title 28, Judiciary and Judicial Procedure.

Fraudulent notice of copyright as a misdemeanor, see section 105 of this title.

Injunctions, see section 112 of this title.

Taxable costs and attorney's fees awarded to plaintiff for failure to pay royalties upon demand, see section 1 (e) of this title.

Taxation of costs, see section 1920 of Title 28, Judiciary and Judicial Procedure.

Willful infringement for profit as a misdemeanor, see section 104 of this title.

ORGANIZED CRIME CONTROL ACT OF 1970, § 901(A)

TITLE 18.—CRIMES AND CRIMINAL PROCEDURE

§ 1964. *Civil remedies.*

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

EDUCATION AMENDMENTS OF 1972

TITLE 20.—EDUCATION

§ 1617. *Attorneys fees.*

Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any Agency thereof), or the United States (or any agency thereof), for failure to comply with any provision of this chapter or for discrimination on the basis of race, color, or national origin in violation of Title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Pub.L. 92-318, Title VII, § 718. June 23, 1972, 86 Stat. 369.

References in Text. Title VI of the Civil Rights Act of 1964, referred to in the text, is classified to section 2000d et seq. of Title 42, The Public Health and Welfare.

Legislative History: For legislative history and purpose of Pub.L. 92-318, see 1972 U.S.Code Cong. and Adm.News, p. —.

FAILURE TO MAKE DISCOVERY

TITLE 28, APPENDIX.—RULES OF CIVIL PROCEDURE

Rule 37.—Failure to make discovery: Sanctions

(a) *Motion for order compelling discovery.*—A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) *Appropriate court.* An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b) (6) or (31)(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fail to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) *Evasive or incomplete answer.* For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) *Award of expenses of motion.* If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

* * * * *

(c) *Expenses on failure to admit.*—If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

NORRIS-LAGUARDIA ACT, § 7

TITLE 29.—LABOR

§ 107. *Issuance of injunctions in labor disputes; hearings; findings of court; notice to affected persons; temporary restraining order; undertakings.*

No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or

committed charged with the duty to protect complainant's property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking mentioned in this section shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing in this section contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity. (Mar. 23, 1932, ch. 90, § 7, 47 Stat. 71.)

FAIR LABOR STANDARDS ACT, § 16(B)

TITLE 29.—LABOR

§ 216. *Penalties; civil and criminal liability; injunction proceedings terminating right of action; waiver of claims; actions by Secretary of Labor; limitation of actions; savings provision.*

(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection.

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT

TITLE 29.—LABOR

§ 501 (b) *Violation of duties; action by member after refusal or failure by labor organization to commence proceedings; jurisdiction; leave of court; counsel fees and expenses.*

When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other

appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made *ex parte*. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

(PATENT INFRINGEMENT)

TITLE 35.—PATENTS

§ 285. *Attorney fees.*

The court in exceptional cases may award reasonable attorney fees to the prevailing party. (July 19, 1952, ch. 950, 66 Stat. 813.)

LEGISLATIVE HISTORY

Reviser's Note.—Based on Title 35, U. S. C., 1946 ed., § 70, part (R. S. 4921, amended (1) Mar 3, 1897, ch. 391, § 6, 29 Stat. 694, (2) Feb. 18, 1922, ch. 58, § 8, 42 Stat. 392, (3) Aug. 1, 1946, ch. 726, § 1, 60 Stat. 778).

This section is substantially the same as the corresponding provision in R. S. 4921; “in exceptional cases” has been added as expressing the intention of the present statute as shown by its legislative history and as interpreted by the courts.

SERVICEMEN'S READJUSTMENT ACT

TITLE 38.—VETERANS' BENEFITS

§ 1822. *Recovery of damages.*

(b) Actions pursuant to the provisions of this section may be instituted by the veteran concerned, in any United States district court, which court may, as a part of any judgment, award costs and reasonable attorneys' fees to the successful party. If the veteran does not institute an action under this section within thirty days after discovering he has overpaid, or having instituted an action shall fail diligently to prosecute the same, or upon request by the veteran the Attorney General in the name of the Government of the United States, may proceed therewith, in which event one-third of any recovery in said action shall be paid over to the veteran and two-thirds thereof shall be paid into the Treasury of the United States.

(c) The remedy provided in this section shall be in addition to any and all other penalties imposed by law. (Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1214; Pub. L. 89-358, § 5(c), Mar. 3, 1966, 80 Stat. 26; Pub. L. 89-623, § 1, Oct. 4, 1966, 80 Stat. 873; Pub. L. 90-301, § 2(b), May 7, 1968, 82 Stat. 113.)

AMENDMENTS

1968—Subsec. (a). Pub. L. 90-301 substituted “section 1812 or 1813” for “section 1810, 1812, 1813, or 1818 of this title, or made under section 1811 or 1818”.

1966—Subsec. (a). Pub. L. 89-623 inserted reference to loans made under section 1811 or 1818 of this title or insured under section 1815 of this title.

Pub. L. 89-358 included reference to section 1818 of this title.

EFFECTIVE DATE OF 1966 AMENDMENT

Section 2 of Pub. L. 89-623 provided that: "The amendment made by this Act [amending subsec. (a) of this section] shall be applicable only to cases in which the offense occurs after date of enactment of this Act [Oct. 4, 1966]."

CLEAN AIR AMENDMENTS OF 1970, § 304(d)

TITLE 42.—THE PUBLIC HEALTH AND WELFARE

§ 1857h-2. *Citizen suits.*

(d) *Award of costs; security.*—The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

CIVIL RIGHTS ACT OF 1964, TITLE II

(Public Accommodations Subchapter)

TITLE 42.—THE PUBLIC HEALTH AND WELFARE

§ 2000a-3. *Civil actions for injunctive relief.*

(a) *Persons aggrieved; intervention by Attorney General; legal representation; commencement of action without payment of fees, costs, or security.*

(b) *Attorney's fees; liability of United States for costs.*—In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person.

CIVIL RIGHTS ACT OF 1964, TITLE VII

(Equal Employment Opportunities Subchapter)

TITLE 42.—THE PUBLIC HEALTH AND WELFARE

§ 2000c-5. *Enforcement provisions.*

(k) *Attorney's fee; liability of Commission and United States for costs.*—In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person. (Pub. L. 88-352, title VII, § 706, July 2, 1964, 78 Stat. 259.)

REFERENCES IN TEXT

Sections 111 and 112, included within the reference to sections 101-115 of Title 29 in subsec. (h), were repealed by act June 25, 1948, ch. 645, § 21, 62 Stat. 862, eff. Sept. 1, 1948, and are now covered by section 3692 of Title 18, Crimes and Criminal Procedure and Federal Rules of Criminal Procedure rule 42, 18 U.S.C., respectively.

EFFECTIVE DATE

Section effective one year after July 2, 1964, see section 716(a) of Pub. L. 88-352, set out as a note under section 2000e of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 2000e-4, 2000e-8, 2000e-9 of this title.

FAIR HOUSING ACT OF 1968

TITLE 42.—THE PUBLIC HEALTH AND WELFARE

§ 3612. *Enforcement by private persons.*

(c) *Injunctive relief and damages; limitation; court costs; attorney fees.*—The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than \$1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: *Provided*, That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees. (Pub. L. 90-284, title VIII, § 812, Apr. 11, 1968, 82 Stat. 88.)

REFERENCES IN TEXT

This Act, referred to in subsec. (a), means Pub. L. 90-284, which enacted this chapter, sections 231-233, 245, 2101, and 2102 of Title 18, and chapter 15 (section 1301 et seq.) of Title 25, amended sections 1973j (a), (c), 3533 (a), and 3535(c) of this title and sections 241, 242, and 1153 of Title 18, enacted provisions set out as notes under section 245 of Title 18, and repealed provisions set out as a note under section 1360 of Title 28.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 3610, 3614 of this title.

ENVIRONMENT NOISE CONTROL ACT OF 1972

TITLE 42.—THE PUBLIC HEALTH AND WELFARE

§ 4911. *Citizen suits.*

(d) *Litigation costs.*—The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such an award is appropriate.

RAILWAY LABOR ACT, § 3

TITLE 45.—RAILROADS

§ 153. *National Railroad Adjustment Board.*

FIRST. ESTABLISHMENT; COMPOSITION; POWERS AND DUTIES; DIVISIONS; HEARINGS AND AWARDS; JUDICIAL REVIEW.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing

actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: *Provided, however*, That such order may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

THE MERCHANT MARINE ACT OF 1936

TITLE 46.—SHIPPING

§ 1227. *Agreements with other carriers forbidden; withholding subsidies; actions by injured persons for damages.*

It shall be unlawful for any contractor receiving an operating-differential subsidy under chapter VI of this chapter or for any charterer of vessels under subchapter VII of this chapter to continue as a party to or to conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports.

No payment or subsidy of any kind shall be paid directly or indirectly out of funds of the United States or any agency of the United States to any contractor or charterer who shall violate this section. Any person who shall be injured in his business or property by reason of anything forbidden by this section may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. (June 29, 1936, ch. 858, § 810, 49 Stat. 2015.)

COMMUNICATIONS ACT OF 1934

TITLE 47.—TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS

§ 206. *Carriers' liability for damages.*

In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case. (June 19, 1934, ch. 652, § 206, 48 Stat. 1072.)

INTERSTATE COMMERCE ACT

TITLE 49.—TRANSPORTATION

§ 8. *Liability in damages to persons injured by violation of law.*

In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful or shall omit to do any act, matter or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case. (Feb. 4, 1887, ch. 104, pt. I, § 8, 24 Stat. 382; Aug. 9, 1935, ch. 498, § 1, 49 Stat. 543.)

INTERSTATE COMMERCE ACT, § 16

TITLE 49.—TRANSPORTATION

§ 16. *Order of Commission and enforcement thereof.*

(2) *Proceedings in courts to enforce orders; costs; attorney's fee.*—If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a complaint setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the plaintiff shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the plaintiff shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

INTERSTATE COMMERCE ACT (WATER CARRIERS)

TITLE 49.—TRANSPORTATION

§ 908. *Reparation awards; limitation of actions.*

(b) In case any carrier shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

93^d CONGRESS
1ST SESSION

S. 973

IN THE SENATE OF THE UNITED STATES

FEBRUARY 22, 1973

Mr. HOLLINGS introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend section 2412 of title 28, United States Code, to provide for the recovery of attorney's fees and expenses in certain actions brought by or against the United States.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That (a) section 2412 of title 28, United States Code, is
4 amended to read as follows:

5 **“§ 2412. Costs and attorney fees**

6 “(a) (1) Except as otherwise specifically provided by
7 statute, a judgment for costs (but not including the fees and
8 expenses of attorneys) shall be awarded to a prevailing
9 party in any civil action brought by or against the United
10 States or any agency or official of the United States acting

1 in his official capacity, in any court having jurisdiction of
2 such action.

3 “(2) For the purposes of this subsection, the term
4 ‘costs’ means those items enumerated in section 1920 of
5 this title. Costs taxed against the Government under this
6 subsection shall, in an amount established by statute or court
7 rule or order, be limited to reimbursing in whole or in part
8 a prevailing party for expenses incurred by him in the liti-
9 gation.

10 “(b) A prevailing party to whom a judgment for costs
11 is awarded under subsection (a) of this section shall also
12 be awarded a judgment for the reasonable fees and expenses
13 of attorneys incurred by that prevailing party in such action
14 if the court having jurisdiction of the action finds that (1)
15 the act or omission of the other party at issue in such action
16 was arbitrary and capricious or in bad faith, or (2) the
17 conduct of the other party in instituting or prosecuting such
18 action was frivolous, unduly dilatory, or in bad faith.

19 “(c) Payment of a judgment under this section shall
20 be as provided in sections 2414 and 2517 of this title.”

21 (b) Item 2412 in the chapter analysis of chapter 161 of
22 title 28, United States Code, is amended to read as follows:

“2412. Costs and attorney fees.”.

23 SEC. 2. The amendment made by the first section of this
24 Act shall apply with respect to any action instituted after the
25 date of enactment of this Act.

Syllabus

MILLS ET AL. v. ELECTRIC AUTO-LITE CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

No. 64. Argued November 13, 1969—Decided January 20, 1970

Petitioners, minority shareholders of respondent Electric Auto-Lite Co., brought this action derivatively and on behalf of minority shareholders as a class to set aside a merger of Auto-Lite and the Mergenthaler Linotype Co. (which before the merger owned over half of Auto-Lite's stock). Petitioners charged that the proxy solicitation for the merger by Auto-Lite's management was materially misleading and violated § 14 (a) of the Securities Exchange Act of 1934 and Rule 14a-9 thereunder in that the merger was recommended to Auto-Lite's shareholders by that company's directors without their disclosing that they were all nominees of and controlled by Mergenthaler. The District Court on petitioners' motion for summary judgment ruled that the claimed defect in the proxy statement was a material omission, and after a hearing concluded that without the votes of minority stockholders approval of the merger could not have been achieved and that a causal relationship had thus been shown between the finding of a § 14 (a) violation and the alleged injury to petitioners. The court referred the case to a master to consider appropriate relief. On interlocutory appeal, the Court of Appeals affirmed the conclusion that the proxy statement was materially deficient but held that the granting of summary judgment with respect to causation was erroneous and that it was necessary to resolve at trial whether there was a causal relationship between the deficiency in the proxy statement and the merger. Finding that causation could not be directly established because of the impracticalities of determining how many votes were affected, the court ruled that the issue was to be determined by proof of fairness of the merger; and if the respondents could prove fairness it could be concluded that a sufficient number of shareholders would have approved the merger regardless of the misrepresentation. *Held*:

1. Fairness of the merger terms does not constitute a defense to a private action for violation of § 14 (a) of the Act complaining of materially misleading solicitation of proxies that authorized a corporate merger. Pp. 381-385.

(a) Permitting liability to be foreclosed on the basis of a finding that the merger was fair would contravene the purpose of § 14 (a) by bypassing the stockholders. Pp. 381-382.

(b) Imposing on small shareholders the burden of rebutting the corporation's evidence of fairness would discourage them from the private enforcement of proxy rules that "provides a necessary supplement to Commission action." *J. I. Case Co. v. Borak*, 377 U. S. 426, 432. Pp. 382-383.

(c) The evidence submitted at the hearing as to the causal relationship between the proxy material and the merger was sufficient to establish petitioners' cause of action. P. 383.

(d) Where, as here, there was proof that the misstatement or omission in the proxy statement was material, this showing that the defect might have been considered important in shaping the shareholders' vote is sufficient without proof, which the Court of Appeals erroneously held was necessary, that its effect was decisive. Pp. 384-385.

2. In devising retrospective relief for violation of the proxy rules the federal courts should be guided by the principles of equity. Pp. 386-389.

(a) The fairness of the merger may be a relevant consideration in determining the appropriate relief, and the merger should be set aside only if a court of equity concludes from all the circumstances that it would be equitable to do so. Pp. 386-388.

(b) Damages should be recoverable here only to the extent that they can be proved. Pp. 388-389.

3. Petitioners, who have established a violation of the securities laws by their corporation and its officials, are entitled to an interim award of litigation expenses and reasonable attorneys' fees incurred in proving the violation, since the expenses petitioners incurred were for the benefit of the corporation and the other stockholders. The Court does not decide the further question of reimbursement for litigation expenses incurred in any ensuing proceedings. Pp. 389-397.

403 F. 2d 429, vacated and remanded.

Arnold I. Shure argued the cause for petitioners. With him on the briefs were *Robert A. Sprecher*, *Edward N. Gadsby*, and *Mozart G. Ratner*.

Albert E. Jenner, Jr., argued the cause for respondents. With him on the brief were *Jerold S. Solovy* and *John G. Stifler*.

Solicitor General Griswold, Lawrence G. Wallace, Philip A. Loomis, Jr., David Ferber, and Meyer Eisenberg filed a brief for the United States as *amicus curiae*.

MR. JUSTICE HARLAN delivered the opinion of the Court.

This case requires us to consider a basic aspect of the implied private right of action for violation of § 14 (a) of the Securities Exchange Act of 1934,¹ recognized by this Court in *J. I. Case Co. v. Borak*, 377 U. S. 426 (1964). As in *Borak* the asserted wrong is that a corporate merger was accomplished through the use of a proxy statement that was materially false or misleading. The question with which we deal is what causal relationship must be shown between such a statement and the merger to establish a cause of action based on the violation of the Act.

I

Petitioners were shareholders of the Electric Auto-Lite Company until 1963, when it was merged into Mergenthaler Linotype Company. They brought suit on the day before the shareholders' meeting at which the vote was to take place on the merger, against Auto-Lite, Mergenthaler, and a third company, American Manufacturing Company, Inc. The complaint sought an injunction against the voting by Auto-Lite's management of all proxies obtained by means of an allegedly misleading proxy solicitation; however, it did not seek a temporary restraining order, and the voting went ahead as scheduled the following day. Several months later

¹ 48 Stat. 895, as amended, 15 U. S. C. § 78n (a).

petitioners filed an amended complaint, seeking to have the merger set aside and to obtain such other relief as might be proper.

In Count II of the amended complaint, which is the only count before us,² petitioners predicated jurisdiction on § 27 of the 1934 Act, 15 U. S. C. § 78aa. They alleged that the proxy statement sent out by the Auto-Lite management to solicit shareholders' votes in favor of the merger was misleading, in violation of § 14 (a) of the Act and SEC Rule 14a-9 thereunder. (17 CFR § 240.14a-9.) Petitioners recited that before the merger Mergenthaler owned over 50% of the outstanding shares of Auto-Lite common stock, and had been in control of Auto-Lite for two years. American Manufacturing in turn owned about one-third of the outstanding shares of Mergenthaler, and for two years had been in voting control of Mergenthaler and, through it, of Auto-Lite. Petitioners charged that in light of these circumstances the proxy statement was misleading in that it told Auto-Lite shareholders that their board of directors recommended approval of the merger without also informing them that all 11 of Auto-Lite's directors were nominees of Mergenthaler and were under the "control and domination of Mergenthaler." Petitioners asserted the right to complain of this alleged violation both derivatively on behalf of Auto-Lite and as representatives of the class of all its minority shareholders.

On petitioners' motion for summary judgment with respect to Count II, the District Court for the Northern District of Illinois ruled as a matter of law that the claimed defect in the proxy statement was, in light of the circumstances in which the statement was made, a material omission. The District Court concluded, from its reading of the *Borak* opinion, that it had to hold a hear-

² In the other two counts, petitioners alleged common-law fraud and that the merger was *ultra vires* under Ohio law.

ing on the issue whether there was "a causal connection between the finding that there has been a violation of the disclosure requirements of § 14 (a) and the alleged injury to the plaintiffs" before it could consider what remedies would be appropriate. (Unreported opinion dated February 14, 1966.)

After holding such a hearing, the court found that under the terms of the merger agreement, an affirmative vote of two-thirds of the Auto-Lite shares was required for approval of the merger, and that the respondent companies owned and controlled about 54% of the outstanding shares. Therefore, to obtain authorization of the merger, respondents had to secure the approval of a substantial number of the minority shareholders. At the stockholders' meeting, approximately 950,000 shares, out of 1,160,000 shares outstanding, were voted in favor of the merger. This included 317,000 votes obtained by proxy from the minority shareholders, votes that were "necessary and indispensable to the approval of the merger." The District Court concluded that a causal relationship had thus been shown, and it granted an interlocutory judgment in favor of petitioners on the issue of liability, referring the case to a master for consideration of appropriate relief. (Unreported findings and conclusions dated Sept. 26, 1967; opinion reported at 281 F. Supp. 826 (1967)).

The District Court made the certification required by 28 U. S. C. § 1292 (b), and respondents took an interlocutory appeal to the Court of Appeals for the Seventh Circuit.³ That court affirmed the District Court's con-

³ Petitioners cross-appealed from an order entered by the District Court two days after its summary judgment in their favor, deleting from that judgment a conclusion of law that "[u]nder the provisions of Section 29 (b) of the Securities Exchange Act of 1934, the merger effectuated through a violation of Section 14 of the Act is void." This deletion was apparently made for the purpose of avoiding any prejudice on the question of relief, which remained open for con-

clusion that the proxy statement was materially deficient, but reversed on the question of causation. The court acknowledged that, if an injunction had been sought a sufficient time before the stockholders' meeting, "corrective measures would have been appropriate." 403 F. 2d 429, 435 (1968). However, since this suit was brought too late for preventive action, the courts had to determine "whether the misleading statement and omission caused the submission of sufficient proxies," as a prerequisite to a determination of liability under the Act. If the respondents could show, "by a preponderance of probabilities, that the merger would have received a sufficient vote even if the proxy statement had not been misleading in the respect found," petitioners would be entitled to no relief of any kind. *Id.*, at 436.

The Court of Appeals acknowledged that this test corresponds to the common-law fraud test of whether the injured party relied on the misrepresentation. However, rightly concluding that "[r]eliance by thousands of individuals, as here, can scarcely be inquired into" (*id.*, at 436 n. 10), the court ruled that the issue was to be determined by proof of the fairness of the terms of the merger. If respondents could show that the merger had merit and was fair to the minority shareholders, the trial court would be justified in concluding that a sufficient number of shareholders would have approved the merger had there been no deficiency in the proxy statement. In that case respondents would be entitled to a judgment in their favor.

Claiming that the Court of Appeals has construed this Court's decision in *Borak* in a manner that frustrates the statute's policy of enforcement through private litigation, the petitioners then sought review in this

sideration by the master. In light of its disposition of respondents' appeal, the Court of Appeals had no need to consider the cross-appeal.

375

Opinion of the Court

Court. We granted certiorari, 394 U. S. 971 (1969), believing that resolution of this basic issue should be made at this stage of the litigation and not postponed until after a trial under the Court of Appeals' decision.⁴

II

As we stressed in *Borak*, § 14 (a) stemmed from a congressional belief that "[f]air corporate suffrage is an important right that should attach to every equity security bought on a public exchange." H. R. Rep. No. 1383, 73d Cong., 2d Sess., 13. The provision was intended to promote "the free exercise of the voting rights of stockholders" by ensuring that proxies would be solicited with "explanation to the stockholder of the real nature of the questions for which authority to cast his vote is sought." *Id.*, at 14; S. Rep. No. 792, 73d Cong., 2d Sess., 12; see 377 U. S., at 431. The decision below, by permitting all liability to be foreclosed on the basis of a finding that the merger was fair, would allow the stockholders to be bypassed, at least where the only legal challenge to the merger is a suit for retrospective relief after the meeting has been held. A judicial appraisal of the merger's merits could be substituted for the actual and informed vote of the stockholders.

⁴ Respondents ask this Court to review the conclusion of the lower courts that the proxy statement was misleading in a material respect. Petitioners naturally did not raise this question in their petition for certiorari, and respondents filed no cross-petition. Since reversal of the Court of Appeals' ruling on this question would not dictate affirmance of that court's judgment, which remanded the case for proceedings to determine causation, but rather elimination of petitioners' rights thereunder, we will not consider the question in these circumstances. *United States v. American Ry. Exp. Co.*, 265 U. S. 425, 435 (1924); *Langnes v. Green*, 282 U. S. 531, 535-539 (1931); *Morley Constr. Co. v. Maryland Cas. Co.*, 300 U. S. 185, 191-192 (1937); R. Stern & E. Gressman, *Supreme Court Practice* 314, 315 (4th ed. 1969).

The result would be to insulate from private redress an entire category of proxy violations—those relating to matters other than the terms of the merger. Even outrageous misrepresentations in a proxy solicitation, if they did not relate to the terms of the transaction, would give rise to no cause of action under § 14 (a). Particularly if carried over to enforcement actions by the Securities and Exchange Commission itself, such a result would subvert the congressional purpose of ensuring full and fair disclosure to shareholders.

Further, recognition of the fairness of the merger as a complete defense would confront small shareholders with an additional obstacle to making a successful challenge to a proposal recommended through a defective proxy statement. The risk that they would be unable to rebut the corporation's evidence of the fairness of the proposal, and thus to establish their cause of action, would be bound to discourage such shareholders from the private enforcement of the proxy rules that "provides a necessary supplement to Commission action." *J. I. Case Co. v. Borak*, 377 U. S., at 432.⁵

⁵ The Court of Appeals' ruling that "causation" may be negated by proof of the fairness of the merger also rests on a dubious behavioral assumption. There is no justification for presuming that the shareholders of every corporation are willing to accept any and every fair merger offer put before them; yet such a presumption is implicit in the opinion of the Court of Appeals. That court gave no indication of what evidence petitioners might adduce, once respondents had established that the merger proposal was equitable, in order to show that the shareholders would nevertheless have rejected it if the solicitation had not been misleading. Proof of actual reliance by thousands of individuals would, as the court acknowledged, not be feasible, see R. Jennings & H. Marsh, *Securities Regulation, Cases and Materials* 1001 (2d ed. 1968); and reliance on the nondisclosure of a fact is a particularly difficult matter to define or prove, see 3 L. Loss, *Securities Regulation* 1766 (2d ed. 1961). In practice, therefore, the objective fairness of the proposal

Such a frustration of the congressional policy is not required by anything in the wording of the statute or in our opinion in the *Borak* case. Section 14 (a) declares it "unlawful" to solicit proxies in contravention of Commission rules, and SEC Rule 14a-9 prohibits solicitations "containing any statement which . . . is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading" Use of a solicitation that is materially misleading is itself a violation of law, as the Court of Appeals recognized in stating that injunctive relief would be available to remedy such a defect if sought prior to the stockholders' meeting. In *Borak*, which came to this Court on a dismissal of the complaint, the Court limited its inquiry to whether a violation of § 14 (a) gives rise to "a federal cause of action for rescission or damages," 377 U. S., at 428. Referring to the argument made by petitioners there "that the merger can be dissolved only if it was fraudulent or non-beneficial, issues upon which the proxy material would not bear," the Court stated: "But the causal relationship of the proxy material and the merger are questions of fact to be resolved at trial, not here. We therefore do not discuss this point further." *Id.*, at 431. In the present case there has been a hearing specifically directed to the causation problem. The question before the Court is whether the facts found on the basis of that hearing are sufficient in law to establish petitioners' cause of action, and we conclude that they are.

would seemingly be determinative of liability. But, in view of the many other factors that might lead shareholders to prefer their current position to that of owners of a larger, combined enterprise, it is pure conjecture to assume that the fairness of the proposal will always be determinative of their vote. Cf. *Wirtz v. Hotel, Motel & Club Employees Union*, 391 U. S. 492, 508 (1968).

Where the misstatement or omission in a proxy statement has been shown to be "material," as it was found to be here, that determination itself indubitably embodies a conclusion that the defect was of such a character that it might have been considered important by a reasonable shareholder who was in the process of deciding how to vote.⁶ This requirement that the defect have a significant *propensity* to affect the voting process is found in the express terms of Rule 14a-9, and it adequately serves the purpose of ensuring that a cause of action cannot be established by proof of a defect so trivial, or so unrelated to the transaction for which approval is sought, that correction of the defect or imposition of liability would not further the interests protected by § 14 (a).

There is no need to supplement this requirement, as did the Court of Appeals, with a requirement of proof

⁶ Cf. *List v. Fashion Park, Inc.*, 340 F. 2d 457, 462 (C. A. 2d Cir. 1965); *General Time Corp. v. Talley Industries, Inc.*, 403 F. 2d 159, 162 (C. A. 2d Cir. 1968); Restatement (Second) of Torts § 538 (2)(a) (Tent. Draft No. 10, 1964); 2 L. Loss, Securities Regulation 917 (2d ed. 1961); 6 *id.*, at 3534 (Supp. 1969).

In this case, where the misleading aspect of the solicitation involved failure to reveal a serious conflict of interest on the part of the directors, the Court of Appeals concluded that the crucial question in determining materiality was "whether the minority shareholders were sufficiently alerted to the board's relationship to their adversary to be on their guard." 403 F. 2d, at 434. An adequate disclosure of this relationship would have warned the stockholders to give more careful scrutiny to the terms of the merger than they might to one recommended by an entirely disinterested board. Thus, the failure to make such a disclosure was found to be a material defect "as a matter of law," thwarting the informed decision at which the statute aims, regardless of whether the terms of the merger were such that a reasonable stockholder would have approved the transaction after more careful analysis. See also *Swanson v. American Consumer Industries, Inc.*, 415 F. 2d 1326 (C. A. 7th Cir. 1969).

of whether the defect actually had a decisive effect on the voting. Where there has been a finding of materiality, a shareholder has made a sufficient showing of causal relationship between the violation and the injury for which he seeks redress if, as here, he proves that the proxy solicitation itself, rather than the particular defect in the solicitation materials, was an essential link in the accomplishment of the transaction. This objective test will avoid the impracticalities of determining how many votes were affected, and, by resolving doubts in favor of those the statute is designed to protect, will effectuate the congressional policy of ensuring that the shareholders are able to make an informed choice when they are consulted on corporate transactions. Cf. *Union Pac. R. Co. v. Chicago & N. W. R. Co.*, 226 F. Supp. 400, 411 (D. C. N. D. Ill. 1964); 2 L. Loss, *Securities Regulation* 962 n. 411 (2d ed. 1961); 5 *id.*, at 2929-2930 (Supp. 1969).⁷

⁷ We need not decide in this case whether causation could be shown where the management controls a sufficient number of shares to approve the transaction without any votes from the minority. Even in that situation, if the management finds it necessary for legal or practical reasons to solicit proxies from minority shareholders, at least one court has held that the proxy solicitation might be sufficiently related to the merger to satisfy the causation requirement, see *Laurenzano v. Einbender*, 264 F. Supp. 356 (D. C. E. D. N. Y. 1966); cf. *Swanson v. American Consumer Industries, Inc.*, 415 F. 2d 1326, 1331-1332 (C. A. 7th Cir. 1969); *Eagle v. Horvath*, 241 F. Supp. 341, 344 (D. C. S. D. N. Y. 1965); *Globus, Inc. v. Jaroff*, 271 F. Supp. 378, 381 (D. C. S. D. N. Y. 1967); Comment, *Shareholders' Derivative Suit to Enforce a Corporate Right of Action Against Directors Under SEC Rule 10b-5*, 114 U. Pa. L. Rev. 578, 582 (1966). But see *Hoover v. Allen*, 241 F. Supp. 213, 231-232 (D. C. S. D. N. Y. 1965); *Barnett v. Anaconda Co.*, 238 F. Supp. 766, 770-774 (D. C. S. D. N. Y. 1965); *Robbins v. Banner Industries, Inc.*, 285 F. Supp. 758, 762-763 (D. C. S. D. N. Y. 1966). See generally 5 L. Loss, *Securities Regulation* 2933-2938 (Supp. 1969).

III

Our conclusion that petitioners have established their case by showing that proxies necessary to approval of the merger were obtained by means of a materially misleading solicitation implies nothing about the form of relief to which they may be entitled. We held in *Borak* that upon finding a violation the courts were "to be alert to provide such remedies as are necessary to make effective the congressional purpose," noting specifically that such remedies are not to be limited to prospective relief. 377 U. S., at 433, 434. In devising retrospective relief for violation of the proxy rules, the federal courts should consider the same factors that would govern the relief granted for any similar illegality or fraud. One important factor may be the fairness of the terms of the merger. Possible forms of relief will include setting aside the merger or granting other equitable relief, but, as the Court of Appeals below noted, nothing in the statutory policy "requires the court to unscramble a corporate transaction merely because a violation occurred." 403 F. 2d, at 436. In selecting a remedy the lower courts should exercise "the sound discretion which guides the determinations of courts of equity," keeping in mind the role of equity as "the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." *Hecht Co. v. Bowles*, 321 U. S. 321, 329-330 (1944), quoting from *Meredith v. Winter Haven*, 320 U. S. 228, 235 (1943).

We do not read § 29 (b) of the Act,⁸ which declares contracts made in violation of the Act or a rule there-

⁸ Section 29 (b) provides in pertinent part: "Every contract made in violation of any provision of this chapter or of any rule or regulation thereunder . . . shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, or regulation,

under "void . . . as regards the rights of" the violator and knowing successors in interest, as requiring that the merger be set aside simply because the merger agreement is a "void" contract. This language establishes that the guilty party is precluded from enforcing the contract against an unwilling innocent party,⁹ but it does not compel the conclusion that the contract is a nullity, creating no enforceable rights even in a party innocent of the violation. The lower federal courts have read § 29 (b), which has counterparts in the Holding Company Act, the Investment Company Act, and the Investment Advisers Act,¹⁰ as rendering the contract merely voidable at the option of the innocent party. See, *e. g.*, *Greater Iowa Corp. v. McLendon*, 378 F. 2d 783, 792 (C. A. 8th Cir. 1967); *Royal Air Properties, Inc. v. Smith*, 312 F. 2d 210, 213 (C. A. 9th Cir. 1962); *Bankers Life & Cas. Co. v. Bellanca Corp.*, 288 F. 2d 784, 787 (C. A. 7th Cir. 1961); *Kaminsky v. Abrams*, 281 F. Supp. 501, 507 (D. C. S. D. N. Y. 1968); *Maher v. J. R. Williston & Beane, Inc.*, 280 F. Supp. 133, 138-139 (D. C. S. D. N. Y. 1967); cf. *Green v. Brown*, 276 F. Supp. 753; 757 (D. C. S. D. N. Y. 1967), remanded on other grounds, 398 F. 2d 1006 (C. A. 2d Cir. 1968) (Investment Company Act). See also 5 Loss, *supra*,

shall have made . . . any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making . . . of such contract was in violation of any such provision, rule, or regulation" 15 U. S. C. § 78cc (b).

⁹ See *Eastside Church of Christ v. National Plan, Inc.*, 391 F. 2d 357, 362-363 (C. A. 5th Cir. 1968); cf. *Goldstein v. Groesbeck*, 142 F. 2d 422, 426-427 (C. A. 2d Cir. 1944).

¹⁰ See Public Utility Holding Company Act of 1935, § 26 (b), 49 Stat. 836, 15 U. S. C. § 79z (b); Investment Company Act of 1940, § 47 (b), 54 Stat. 846, 15 U. S. C. § 80a-46 (b); Investment Advisers Act of 1940, § 215 (b), 54 Stat. 856, 15 U. S. C. § 80b-15 (b).

at 2925–2926 (Supp. 1969); 6 *id.*, at 3866. This interpretation is eminently sensible. The interests of the victim are sufficiently protected by giving him the right to rescind; to regard the contract as void where he has not invoked that right would only create the possibility of hardships to him or others without necessarily advancing the statutory policy of disclosure.

The United States, as *amicus curiae*, points out that as representatives of the minority shareholders, petitioners are not parties to the merger agreement and thus do not enjoy a statutory right under § 29 (b) to set it aside.¹¹ Furthermore, while they do have a derivative right to invoke Auto-Lite's status as a party to the agreement, a determination of what relief should be granted in Auto-Lite's name must hinge on whether setting aside the merger would be in the best interests of the shareholders as a whole. In short, in the context of a suit such as this one, § 29 (b) leaves the matter of relief where it would be under *Borak* without specific statutory language—the merger should be set aside only if a court of equity concludes, from all the circumstances, that it would be equitable to do so. Cf. *SEC v. National Securities, Inc.*, 393 U. S. 453, 456, 463–464 (1969).

Monetary relief will, of course, also be a possibility. Where the defect in the proxy solicitation relates to the specific terms of the merger, the district court might appropriately order an accounting to ensure that the shareholders receive the value that was represented as coming to them. On the other hand, where, as here, the

¹¹ If petitioners had submitted their own proxies in favor of the merger in response to the unlawful solicitation, as it does not appear they did, the language of § 29 (b) would seem to give them, as innocent parties to that transaction, a right to rescind their proxies. But it is clear in this case, where petitioners' combined holdings are only 600 shares, that such rescission would not affect the authorization of the merger.

misleading aspect of the solicitation did not relate to terms of the merger, monetary relief might be afforded to the shareholders only if the merger resulted in a reduction of the earnings or earnings potential of their holdings. In short, damages should be recoverable only to the extent that they can be shown. If commingling of the assets and operations of the merged companies makes it impossible to establish direct injury from the merger, relief might be predicated on a determination of the fairness of the terms of the merger at the time it was approved. These questions, of course, are for decision in the first instance by the District Court on remand, and our singling out of some of the possibilities is not intended to exclude others.

IV

Although the question of relief must await further proceedings in the District Court, our conclusion that petitioners have established their cause of action indicates that the Court of Appeals should have affirmed the partial summary judgment on the issue of liability.¹² The result would have been not only that respondents, rather than petitioners, would have borne the costs of the appeal, but also, we think, that petitioners would have been entitled to an interim award of litigation expenses and reasonable attorneys' fees. Cf. *Highway Truck Drivers Local 107 v. Cohen*, 220 F. Supp. 735 (D. C. E. D. Pa. 1963). We agree with the position taken by petitioners, and by the United States as *amicus*, that petitioners, who have established a violation of the securities laws by their corporation and its officials,

¹² The Court of Appeals might have modified the judgment of the District Court to the extent that it referred the issue of relief to a master under Fed. Rule Civ. Proc. 53 (b). The Court of Appeals' opinion indicates doubt whether the referral was appropriate. 493 F. 2d, at 436. This issue is not before us.

should be reimbursed by the corporation or its survivor for the costs of establishing the violation.¹³

The absence of express statutory authorization for an award of attorneys' fees in a suit under § 14 (a) does not preclude such an award in cases of this type. In a suit by stockholders to recover short-swing profits for their corporation under § 16 (b) of the 1934 Act, the Court of Appeals for the Second Circuit has awarded attorneys' fees despite the lack of any provision for them in § 16 (b), "on the theory that the corporation which has received the benefit of the attorney's services should pay the reasonable value thereof." *Smolowe v. Delendo Corp.*, 136 F. 2d 231, 241 (C. A. 2d Cir. 1943). The court held that Congress' inclusion in §§ 9 (e) and 18 (a) of the Act of express provisions for recovery of attorneys' fees in certain other types of suits¹⁴ "does not impinge [upon] the result we reach in the absence of statute, for those sections merely enforce an additional penalty against the wrongdoer." *Ibid.*

We agree with the Second Circuit that the specific provisions in §§ 9 (e) and 18 (a) should not be read as denying to the courts the power to award counsel fees

¹³ We believe that the question of reimbursement for these expenses has a sufficiently close relationship to the determination of what constitutes a cause of action under § 14 (a) that it is appropriate for decision at this time. The United States urges the Court to consider also whether petitioners will be entitled to recoup expenses reasonably incurred in further litigation on the question of relief. We are urged to hold that such expenses should be reimbursed regardless of whether petitioners are ultimately successful in obtaining significant relief. However, the question of reimbursement for future expenses should be resolved in the first instance by the lower courts after the issue of relief has been litigated and a record has been established concerning the need for a further award. We express no view on the matter at this juncture.

¹⁴ These provisions deal, respectively, with manipulation of security prices and with misleading statements in documents filed with the Commission. See 15 U. S. C. §§ 78i (e), 78r (a).

in suits under other sections of the Act when circumstances make such an award appropriate, any more than the express creation by those sections of private liabilities negates the possibility of an implied right of action under § 14 (a). The remedial provisions of the 1934 Act are far different from those of the Lanham Act, § 35, 60 Stat. 439, 15 U. S. C. § 1117, which have been held to preclude an award of attorneys' fees in a suit for trademark infringement. *Fleischmann Corp. v. Maier Brewing Co.*, 386 U. S. 714 (1967). Since Congress in the Lanham Act had "meticulously detailed the remedies available to a plaintiff who proves that his valid trademark has been infringed," the Court in *Fleischmann* concluded that the express remedial provisions were intended "to mark the boundaries of the power to award monetary relief in cases arising under the Act." 386 U. S., at 719, 721. By contrast, we cannot fairly infer from the Securities Exchange Act of 1934 a purpose to circumscribe the courts' power to grant appropriate remedies. Cf. *Bakery Workers Union v. Ratner*, 118 U. S. App. D. C. 269, 274-275. 335 F. 2d 691, 696-697 (1964). The Act makes no provision for private recovery for a violation of § 14 (a), other than the declaration of "voidness" in § 29 (b), leaving the courts with the task, faced by this Court in *Borak*, of deciding whether a private right of action should be implied. The courts must similarly determine whether the special circumstances exist that would justify an award of attorneys' fees, including reasonable expenses of litigation other than statutory costs.¹⁵

While the general American rule is that attorneys' fees are not ordinarily recoverable as costs, both the courts and Congress have developed exceptions to this rule for situations in which overriding considerations

¹⁵ Cf. Note, Attorney's Fees: Where Shall the Ultimate Burden Lie?, 20 Vand. L. Rev. 1216, 1229 and n. 68 (1967).

indicate the need for such a recovery.¹⁶ A primary judge-created exception has been to award expenses where a plaintiff has successfully maintained a suit, usually on behalf of a class, that benefits a group of others in the same manner as himself. See *Fleischmann Corp. v. Maier Brewing Co.*, 386 U. S., at 718-719. To allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense. This suit presents such a situation. The dissemination of misleading proxy solicitations was a "deceit practiced on the stockholders as a group," *J. I. Case Co. v. Borak*, 377 U. S., at 432, and the expenses of petitioners' lawsuit have been incurred for the benefit of the corporation and the other shareholders.

The fact that this suit has not yet produced, and may never produce, a monetary recovery from which the fees could be paid does not preclude an award based on this rationale. Although the earliest cases recognizing a right to reimbursement involved litigation that had produced or preserved a "common fund" for the benefit of a group, nothing in these cases indicates that the suit must actually bring money into the court as a prerequisite to the court's power to order reimbursement of expenses.¹⁷ "[T]he foundation for the historic

¹⁶ Many commentators have argued for a more thoroughgoing abandonment of the rule. See, e. g., Ehrenzweig, Reimbursement of Counsel Fees and the Great Society, 54 Calif. L. Rev. 792 (1966); Kuenzel, The Attorney's Fee: Why Not a Cost of Litigation? 49 Iowa L. Rev. 75 (1963); McCormick, Counsel Fees and Other Expenses of Litigation as an Element of Damages, 15 Minn. L. Rev. 619 (1931); Stoebuck, Counsel Fees Included in Costs: A Logical Development, 38 U. Colo. L. Rev. 202 (1966); Note, *supra*, n. 15.

¹⁷ See *Trustees v. Greenough*, 105 U. S. 527, 531-537 (1882); *Central R. R. & Banking Co. v. Pettus*, 113 U. S. 116 (1885);

practice of granting reimbursement for the costs of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation." *Sprague v. Ticonic Nat. Bank*, 307 U. S. 161, 166 (1939). This Court in *Sprague* upheld the District Court's power to grant reimbursement for a plaintiff's litigation expenses even though she had sued only on her own behalf and not for a class, because her success would have a *stare decisis* effect entitling others to recover out of specific assets of the same defendant. Although those others were not parties before the court, they could be forced to contribute to the costs of the suit by an order reimbursing the plaintiff from the defendant's assets out of which their recoveries later would have to come. The Court observed that "the absence of an avowed class suit or the creation of a fund, as it were, through *stare decisis* rather than through a decree—hardly touch[es] the power of equity in doing justice as between a party and the beneficiaries of his litigation." *Id.*, at 167.

Other cases have departed further from the traditional metes and bounds of the doctrine, to permit reimbursement in cases where the litigation has conferred a sub-

Hornstein. The Counsel Fee in Stockholder's Derivative Suits, 39 Col. L. Rev. 784 (1939).

Even in the original "fund" case in this Court, it was recognized that the power of equity to award fees was not restricted to the court's ability to provide reimbursement from the fund itself: "It would be very hard on [the successful plaintiff] to turn him away without any allowance It would not only be unjust to him, but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage. He has worked for them as well as for himself; and if he cannot be reimbursed out of the fund itself, they ought to contribute their due proportion of the expenses which he has fairly incurred. To make them a charge upon the fund is the most equitable way of securing such contribution." *Trustees v. Greenough*, 105 U. S., at 532.

stantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them. This development has been most pronounced in shareholders' derivative actions, where the courts increasingly have recognized that the expenses incurred by one shareholder in the vindication of a corporate right of action can be spread among all shareholders through an award against the corporation, regardless of whether an actual money recovery has been obtained in the corporation's favor.¹⁸ For example, awards have been sustained in suits by stockholders complaining that shares of their corporation had been issued wrongfully for an inadequate consideration.¹⁹ A successful suit of this type, resulting in cancellation of the shares, does not bring a fund into court or add to the assets of the corporation, but it does benefit the holders of the remaining shares by enhancing their value. Similarly, holders of voting trust certificates have been allowed reimbursement of their expenses from the corporation where they succeeded in terminating the voting trust and obtaining for all certificate holders the right to vote their shares.²⁰ In these cases there

¹⁸ See, e. g., *Holthusen v. Edward G. Budd Mfg. Co.*, 55 F. Supp. 945 (D. C. E. D. Pa. 1944); *Runswick v. Floor*, 116 Utah 91, 208 P. 2d 948 (1949); cases cited n. 22, *infra*. See generally Hornstein, Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards, 69 Harv. L. Rev. 658, 669-679 (1956); Smith, Recovery of Plaintiff's Attorney's Fees in Corporate Litigation, 40 L. A. Bar Bull. 15 (1964).

¹⁹ *Hartman v. Oatman Gold Mining & Milling Co.*, 22 Ariz. 476, 198 P. 717 (1921); *Greenough v. Coeur D'Alenes Lead Co.*, 52 Idaho 599, 18 P. 2d 288 (1932); cf. *Riverside Oil & Refining Co. v. Lynch*, 114 Okla. 198, 243 P. 967 (1925).

²⁰ *Allen v. Chase Nat. Bank*, 180 Misc. 259, 40 N. Y. S. 2d 245 (Sup. Ct. 1943), sequel to *Allen v. Chase Nat. Bank*, 178 Misc. 536, 35 N. Y. S. 2d 958 (Sup. Ct. 1942).

was a "common fund" only in the sense that the court's jurisdiction over the corporation as nominal defendant made it possible to assess fees against all of the shareholders through an award against the corporation.²¹

In many of these instances the benefit conferred is capable of expression in monetary terms, if only by estimating the increase in market value of the shares attributable to the successful litigation. However, an increasing number of lower courts have acknowledged that a corporation may receive a "substantial benefit" from a derivative suit, justifying an award of counsel fees, regardless of whether the benefit is pecuniary in nature.²² A leading case is *Bosch v. Meeker Cooperative Light & Power Assn.*, 257 Minn. 362, 101 N. W. 2d 423 (1960), in which a stockholder was reimbursed for his expenses in obtaining a judicial declaration that the

²¹ Cf. Note, Allowance of Counsel Fees Out of a "Fund in Court": The New Jersey Experience, 17 Rutgers L. Rev. 634, 638-643 (1963).

²² See *Schechtman v. Wolfson*, 244 F. 2d 537, 540 (C. A. 2d Cir. 1957); *Grant v. Hartman Ranch Co.*, 193 Cal. App. 2d 497, 14 Cal. Rptr. 531 (1961); *Treves v. Servel, Inc.*, 38 Del. Ch. 483, 154 A. 2d 188 (Del. Sup. Ct. 1959); *Saks v. Gamble*, 38 Del. Ch. 504, 154 A. 2d 767 (1958); *Yap v. Wah Yen Ki Tuk Tsen Nin Hue*, 43 Haw. 37, 42 (1958); *Berger v. Amana Society*, 253 Iowa 378, 387, 111 N. W. 2d 753, 758 (1962); *Bosch v. Meeker Cooperative Light & Power Assn.*, 257 Minn. 362, 101 N. W. 2d 423 (1960); *Eisenberg v. Central Zone Property Corp.*, 1 App. Div. 2d 353, 149 N. Y. S. 2d 840 (Sup. Ct. 1956), aff'd per curiam, 3 N. Y. 2d 729, 143 N. E. 2d 516 (1957); *Martin Foundation v. Phillip-Jones Corp.*, 283 App. Div. 729, 127 N. Y. S. 2d 649 (Sup. Ct. 1954); *Abrams v. Textile Realty Corp.*, 197 Misc. 25, 93 N. Y. S. 2d 808 (Sup. Ct. 1949); 97 N. Y. S. 2d 492 (op. of Referee); *Long Park, Inc. v. Trenton-New Brunswick Theatres Co.*, 274 App. Div. 988, 84 N. Y. S. 2d 482 (Sup. Ct. 1948), aff'd per curiam, 299 N. Y. 718, 87 N. E. 2d 126 (1949); Smith, *supra*, n. 18; Shareholder Suits: Pecuniary Benefit Unnecessary for Counsel Fee Award, 13 Stan. L. Rev. 146 (1960).

election of certain of the corporation's directors was invalid. The Supreme Court of Minnesota stated:

"Where an action by a stockholder results in a substantial benefit to a corporation he should recover his costs and expenses. . . . [A] substantial benefit must be something more than technical in its consequence and be one that accomplishes a result which corrects or prevents an abuse which would be prejudicial to the rights and interests of the corporation or affect the enjoyment or protection of an essential right to the stockholder's interest." *Id.*, at 366-367, 101 N. W. 2d, at 426-427.

In many suits under § 14 (a), particularly where the violation does not relate to the terms of the transaction for which proxies are solicited, it may be impossible to assign monetary value to the benefit. Nevertheless, the stress placed by Congress on the importance of fair and informed corporate suffrage leads to the conclusion that, in vindicating the statutory policy, petitioners have rendered a substantial service to the corporation and its shareholders. Cf. *Bakery Workers Union v. Ratner*, 118 U. S. App. D. C. 269, 274, 335 F. 2d 691, 696 (1964). Whether petitioners are successful in showing a need for significant relief may be a factor in determining whether a further award should later be made. But regardless of the relief granted, private stockholders' actions of this sort "involve corporate therapeutics,"²³ and furnish a benefit to all shareholders by providing an important means of enforcement of the proxy statute.²⁴ To award attorneys' fees in such a suit to a plaintiff who has succeeded in establishing a cause of action is not to saddle the unsuccessful party with the expenses but to impose

²³ *Murphy v. North American Light & Power Co.*, 33 F. Supp. 567, 570 (D. C. S. D. N. Y. 1940).

²⁴ Cf. Hornstein, *supra*, n. 18, at 659, 662-663.

375

Opinion of BLACK, J.

them on the class that has benefited from them and that would have had to pay them had it brought the suit.

For the foregoing reasons we conclude that the judgment of the Court of Appeals should be vacated and the case remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK, concurring in part and dissenting in part.

I substantially agree with Parts II and III of the Court's opinion holding that these stockholders have sufficiently proved a violation of § 14 (a) of the Securities Exchange Act of 1934 and are thus entitled to recover whatever damages they have suffered as a result of the misleading corporate statements, or perhaps to an equitable setting aside of the merger itself. I do not agree, however, to what appears to be the holding in Part IV that stockholders who hire lawyers to prosecute their claims in such a case can recover attorneys' fees in the absence of a valid contractual agreement so providing or an explicit statute creating such a right of recovery. The courts are interpreters, not creators, of legal rights to recover and if there is a need for recovery of attorneys' fees to effectuate the policies of the Act here involved, that need should in my judgment be met by Congress, not by this Court.

SUPREME COURT OF THE UNITED STATES

DEBORAH A. NORTHCROSS ET AL. v. BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 72-1164 Decided June 4, 1973

PER CURIAM.

This case presents the question of the propriety, under § 718 of the Emergency School Aid Act of 1972, 86 Stat. 235, of a denial of costs and attorneys' fees to the successful plaintiffs in this litigation aimed at desegregating the public schools of Memphis, Tennessee. Section 718, which became effective on July 1, 1972, provides that "[u]pon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof)," in any action seeking to redress illegal or unconstitutional discrimination with respect to "elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." In this case, the United States Court of Appeals for the Sixth Circuit denied petitioners' motion for an award of costs and attorneys' fees. The Court of Appeals did not, however, state reasons for the denial and it is therefore not possible for this Court to determine whether the Court of Appeals applied the proper standard in reaching this result.¹

¹ Respondents suggest that petitioners' motion for costs and attorneys' fees might have been denied due to untimeliness. Although it

2 *NORTHCROSS v. MEMPHIS CITY BOARD OF EDUCATION*

Section 718 tracks the wording of § 204 (b) of the Civil Rights Act of 1964, 42 U. S. C. § 2000a-3 (b), which provides that, in an action seeking to enforce Title II of that Act, “the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs. . . .” In *Newman v. Piggie Park Enterprises, Inc.*, 390 U. S. 400 (1968), we held that, under § 204 (b), “one who succeeds in obtaining an injunction under that Title should ordinarily recover an attorney’s fee unless special circumstances would render such an award unjust.” *Id.*, at 402. The similarity of language in § 718 and § 204 (b) is, of course, a strong indication that the two statutes should be interpreted *pari passu*. Moreover, “the two provisions share a common *raison d’être*. The plaintiffs in school cases are ‘private attorneys general’ vindicating national policy in the same sense as are plaintiffs in Title II actions. The enactment of both provisions was for the same purpose—‘to encourage individuals injured by racial discrimination to seek judicial relief. . . .’” *Johnson v. Combs*, — F. 2d —, — (CA5 1972), quoting *Newman v. Piggie Park Enterprises, Inc.*, *supra*, at 402. We therefore conclude that, as with § 204 (b), if other requirements of § 718 are satisfied, the successful plaintiff “should ordinarily recover an attorney’s fee unless special circumstances would render such an award unjust.” Since it is impossible for us to determine whether the Court of Appeals applied this standard and, if so, whether it did so correctly, we grant the petition for certiorari, vacate the judgment below insofar as it relates to the denial of costs and attorneys’ fees, and remand to the Court of Appeals for further proceedings consistent

is clear that the petitions for rehearing *en banc* were denied as untimely, there is no indication that the bill of costs was filed out of time, or that costs and attorney’s fees were denied for that reason.

NORTHCROSS v. MEMPHIS CITY BOARD OF EDUCATION 3

with this opinion.² See *Taylor v. McKeithen*, 407 U. S. 191 (1972); cf. *California v. Krivda*, 409 U. S. 33 (1972).

MR. JUSTICE MARSHALL did not participate in the consideration or disposition of this case.

² We need not, and therefore do not, decide whether § 718 authorizes an award of attorneys' fees insofar as those expenses were incurred prior to the date that that section came into effect. We also do not decide whether, and under what circumstances, an award of attorneys' fees is permissible in suits brought under 42 U. S. C. § 1983 in the absence of specific statutory authorization for such an award. See *Knight v. Auriello*, 453 F. 2d 852. (CA1 1972); *Lee v. Southern Home Sites Corp.*, 444 F. 2d 143 (CA5 1971).

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1972

HALL ET AL. *v.* COLE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

No. 72-630. Argued March 21, 1973—Decided May 21, 1973

Respondent, expelled from his union for deliberate and malicious vilification of union management following his resolutions unsuccessfully condemning that management's alleged undemocratic actions and shortsighted policies, regained his union membership in a suit under § 102 of the Labor-Management Reporting and Disclosure Act (LMRDA) and was awarded \$5,500 in legal fees. The Court of Appeals affirmed. *Held:*

1. Respondent's suit under § 102 of the LMRDA vindicated not only his own rights of free speech guaranteed by the statute but furthered the interests of the union and its members as well. As a result, the award to respondent of attorneys' fees under these circumstances comported with the trial court's inherent equitable power of making such an award whenever "overriding considerations indicate the need for such a recovery." *Mills v. Electric Auto-Lite Co.*, 396 U. S. 375, 391-392. Pp. 4-9.

2. The allowance of counsel fees to the successful plaintiff in a suit brought under § 102 is not precluded by that statutory provision and, indeed, is supported by the legislative history of the LMRDA. Pp. 9-14.

3. Under all the facts of the case, the District Court did not

Opinion of the Court

412 U.S.

abuse its discretion in awarding counsel fees to respondent.
Pp. 14-15.

462 F. 2d 777, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, STEWART, BLACKMUN, and POWELL, JJ., joined. WHITE, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 16. MARSHALL, J., took no part in the consideration or decision of the case.

Howard Schulman argued the cause and filed a brief for petitioners.

Burton H. Hall argued the cause and filed a brief for respondent.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This case requires us to consider the propriety of an award of counsel fees to a successful plaintiff in a suit brought under § 102 of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 523, 29 U. S. C. § 412.¹ On August 6, 1962, at a regular meeting of the membership of petitioner Seafarers International Union of North America—Atlantic, Gulf, Lakes and Inland Waters District, respondent introduced a set of resolutions alleging various instances of undemocratic actions and shortsighted policies on the part of union officers.

**J. Albert Weil, Laurence Gold, and Thomas E. Harris* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging reversal.

Melvin L. Wulf and Sanford J. Rosen filed a brief for the American Civil Liberties Union as *amicus curiae* urging affirmance.

¹Section 102 of the Act, 29 U. S. C. § 412, provides in pertinent part:

"Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate."

1

Opinion of the Court

The resolutions were defeated and, on November 26, 1962, respondent was expelled from the union on the ground that his presentation of the resolutions violated a union rule proscribing "deliberate or malicious vilification with regard to the execution or the duties of any office or job." After exhausting his intra-union remedies, respondent filed this suit under § 102 of the LMRDA, claiming that his expulsion under these circumstances violated his right of free speech as secured by § 101 (a)(2) of the Act, 29 U. S. C. § 411 (a)(2).²

On May 27, 1964, the United States District Court for the Eastern District of New York issued a temporary injunction restoring respondent's membership in the union, and the United States Court of Appeals for the Second Circuit affirmed. 339 F. 2d 881 (1965). Some five years later, the case came on for trial and the District Court, finding a violation of respondent's rights under § 101 (a)(2), ordered him permanently reinstated to membership in the union and, although denying respondent's damages claims,³ granted him counsel fees in the sum of \$5,500 against the union. The Court of

² Section 101 (a)(2) of the Act, 29 U. S. C. § 411 (a)(2), provides:

"Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations."

³ In its unreported opinion, the District Court found that respondent "suffered no loss of wages as a result of his expulsion from the union." And although respondent "was deprived of his right

Appeals affirmed in all respects, 462 F. 2d 777 (1972). We granted certiorari limited to the questions whether (1) an award of attorneys' fees is permissible under § 102 of the LMRDA, and (2) if so, whether such an award under the facts of this case constituted an abuse of the District Court's discretion. 409 U. S. 1074. We affirm.

I

Although the traditional American⁴ rule ordinarily disfavors the allowance of attorneys' fees in the absence of statutory⁵ or contractual authorization,⁶ federal courts,

to attend meetings, and run for union office" during the period of his expulsion, the District Court concluded that "[t]he record is barren of any proof on which the court might make a determination of the value of [these rights]." Finally, the court denied respondent's claim for punitive damages on the ground that the union's decision to expel respondent was motivated neither by malice nor bad faith.

⁴ The American rule, it might be noted, is more restrictive than the general rule that prevails in most other nations. See, e. g., Ehrenzweig, Reimbursement of Counsel Fees and the Great Society, 54 Calif. L. Rev. 792, 793 (1966). Many commentators have argued for a "liberalization" of the American rule. See, e. g., Stoebe, Counsel Fees Included in Costs: A Logical Development, 38 U. Colo. L. Rev. 202 (1966); Ehrenzweig, *supra*; Kuenzel, The Attorney's Fee: Why Not a Cost of Litigation?, 49 Iowa L. Rev. 75 (1963); McCormick, Counsel Fees and Other Expenses of Litigation as an Element of Damages, 15 Minn. L. Rev. 619 (1931); Comment, The Allocation of Attorney's Fees After *Mills v. Electric Auto-Lite Co.*, 38 U. Chi. L. Rev. 316 (1971); Note, Attorney's Fees: Where Shall the Ultimate Burden Lie?, 20 Vand. L. Rev. 1216 (1967).

⁵ See, e. g., Clayton Act, § 4, 38 Stat. 731, 15 U. S. C. § 15; Communications Act of 1934, § 206, 48 Stat. 1072, 47 U. S. C. § 206; Interstate Commerce Act, § 16, 34 Stat. 590, 49 U. S. C. § 16 (2); Securities Exchange Act of 1934, §§ 9 (e), 18 (a), 48 Stat. 890, 897, 15 U. S. C. §§ 78i (e), 78r (a).

⁶ See, e. g., *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U. S. 714, 717 (1967); *Hauenstein v. Lynham*, 100 U. S. 483 (1880); *Day v. Woodworth*, 13 How. 363 (1852).

1

Opinion of the Court

in the exercise of their equitable powers, may award attorneys' fees when the interests of justice so require. Indeed, the power to award such fees "is part of the original authority of the chancellor to do equity in a particular situation." *Sprague v. Ticonic National Bank*, 307 U. S. 161, 166 (1939), and federal courts do not hesitate to exercise this inherent equitable power whenever "overriding considerations indicate the need for such a recovery." *Mills v. Electric Auto-Lite Co.*, 396 U. S. 375, 391-392 (1970); see *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U. S. 714, 718 (1967).

Thus, it is unquestioned that a federal court may award counsel fees to a successful party when his opponent has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons." 6 J. Moore, *Federal Practice* ¶ 54.77 [2], p. 1709 (2d ed. 1972); see, e. g., *Newman v. Piggie Park Enterprises, Inc.*, 390 U. S. 400, 402 n. 4 (1968); *Vaughan v. Atkinson*, 369 U. S. 527 (1962); *Bell v. School Bd. of Powhatan County*, 321 F. 2d 494 (CA4 1963); *Rolax v. Atlantic Coast Line R. Co.*, 186 F. 2d 473 (CA4 1951). In this class of cases, the underlying rationale of "fee shifting" is, of course, punitive, and the essential element in triggering the award of fees is therefore the existence of "bad faith" on the part of the unsuccessful litigant.

Another established exception involves cases in which the plaintiff's successful litigation confers "a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them." *Mills v. Electric Auto-Lite*, *supra*, at 393-394.⁷ "Fee shifting"

⁷ This exception has its origins in the "common fund" cases, which have traditionally awarded attorneys' fees to the successful plaintiff when his representative action creates or traces a "common fund," the economic benefit of which is shared by all members of the class.

is justified in these cases, not because of any "bad faith" of the defendant but, rather, because "[t]o allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense." *Id.*, at 392; see also *Fleischmann Distilling Corp. v. Maier Brewing Co.*, *supra*, at 719; *Trustees v. Greenough*, 105 U. S. 527, 532 (1882). Thus, in *Mills v. Electric Auto-Lite Co.*, *supra*, we approved an award of attorneys' fees to successful shareholder plaintiffs in

See, e. g., *Central Railroad & Banking Co. v. Pettus*, 113 U. S. 116 (1885); *Trustees v. Greenough*, 105 U. S. 527 (1882). In *Sprague v. Ticonic National Bank*, 307 U. S. 161 (1939), the rationale of these cases was extended to authorize an award of attorneys' fees to a successful plaintiff who, although suing on her own behalf rather than as representative of a class, nevertheless established the right of others to recover out of specific assets of the same defendant through the operation of *stare decisis*. In reaching this result, the Court explained that the beneficiaries of the plaintiff's litigation could be made to contribute to the costs of the suit by an order reimbursing the plaintiff out of the defendant's assets from which the beneficiaries eventually would recover. Finally, in *Mills v. Electric Auto-Lite Co.*, 396 U. S. 375 (1970), we held that the rationale of these cases must logically extend, not only to litigation that confers a monetary benefit on others, but also to litigation "which corrects or prevents an abuse which would be prejudicial to the rights and interests" of those others. *Id.*, at 396, quoting *Bosch v. Meeker Cooperative Light & Power Assn.*, 257 Minn. 362, 366-367, 101 N. W. 2d 423, 427 (1960).

Citing our decisions in *Mills*, *supra*, and *Newman v. Piggie Park Enterprises, Inc.*, 390 U. S. 400 (1968), respondent contends that the award of attorneys' fees in this case might also be justified on the ground that, by successfully prosecuting this litigation, respondent acted as a "private attorney general," vindicating a policy that Congress considered of the highest priority." *Id.*, at 402. See also *Knight v. Auciello*, 453 F. 2d 852 (CA1 1972); *Lee v. Southern Home Sites Corp.*, 444 F. 2d 143 (CA5 1971). In light of our conclusion with respect to the "common benefit" rationale, however, we have no occasion to consider that question.

1

Opinion of the Court

a suit brought to set aside a corporate merger accomplished through the use of a misleading proxy statement in violation of § 14 (a) of the Securities Exchange Act of 1934, 48 Stat. 895, 15 U. S. C. § 78n (a). In reaching this result, we reasoned that, since the dissemination of misleading proxy solicitations jeopardized important interests of both the corporation and “the stockholders as a group,”⁸ the successful enforcement of the statutory policy necessarily “rendered a substantial service to the corporation and its shareholders.” *Mills v. Electric Auto-Lite Co.*, *supra*, at 396. Under these circumstances, reimbursement of the plaintiffs’ attorneys’ fees out of the corporate treasury simply shifted the costs of litigation to “the class that has benefited from them and that would have had to pay them had it brought the suit.” *Id.*, at 397.

The instant case is clearly governed by this aspect of *Mills*. The Labor-Management Reporting and Disclosure Act of 1959 was based, in part, on a congressional finding “from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct” 29 U. S. C. § 401 (b). In an effort to eliminate these abuses, Congress recognized that it was imperative that all union members be guaranteed at least “minimum standards of democratic process. . . .”⁹ Thus, Title I¹⁰ of the LMRDA—the “Bill of Rights of Members of Labor Organizations”—was specifically designed to promote the “full and active par-

⁸ *Mills v. Electric Auto-Lite Co.*, *supra*, at 392, quoting *J. I. Case Co. v. Borak*, 377 U. S. 426, 432 (1964).

⁹ 105 Cong. Rec. 6471 (1959) (Sen. McClellan).

¹⁰ 29 U. S. C. §§ 411–415.

ticipation by the rank and file in the affairs of the union,"¹¹ and, as the Court of Appeals noted, the rights enumerated in Title I¹² were deemed "vital to the independence of the membership and the effective and fair operation of the union as the representative of its membership." 462 F. 2d, at 780. See also *International Assn. of Machinists v. Nix*, 415 F. 2d 212 (CA5 1969); *Salzhandler v. Caputo*, 316 F. 2d 445 (CA2 1963).

Viewed in this context, there can be no doubt that, by vindicating his own right of free speech guaranteed by § 101 (a)(2) of Title I of the LMRDA, respondent necessarily rendered a substantial service to his union as an institution and to all of its members. When a union member is disciplined for the exercise of any of the rights protected by Title I, the rights of all members of the union are threatened. And, by vindicating his own right, the successful litigant dispels the "chill" cast upon the rights of others. Indeed, to the extent that such lawsuits contribute to the preservation of union democracy, they frequently prove beneficial "not only in the immediate impact of the results achieved but in their implications for the future conduct of the union's affairs." *Yablonski v. United Mine Workers of America*, 150 U. S. App. D. C. 253, 260, 466 F. 2d 424, 431 (1972). Thus, as in *Mills*, reimbursement of respondent's attorneys' fees

¹¹ *American Federation of Musicians v. Wittstein*, 379 U. S. 171, 182-183 (1964).

¹² In addition to the Tit. I guarantee of freedom of speech and assembly involved in this case, 29 U. S. C. § 411 (a)(2), see n. 2, *supra*, Tit. I also guarantees equal "political" rights to all union members, 29 U. S. C. § 411 (a)(1); stability and fairness in the assessment of dues, initiation fees, and other assessments, 29 U. S. C. § 411 (a)(3); the right of all union members to sue and to participate in litigation, 29 U. S. C. § 411 (a)(4); and procedural fairness in the discipline process, 29 U. S. C. § 411 (a)(5).

1

Opinion of the Court

out of the union treasury¹³ simply shifts the costs of litigation to “the class that has benefited from them and that would have had to pay them had it brought the suit.” *Mills v. Electric Auto-Lite Co.*, *supra*, at 397. See also *Yablonski v. United Mine Workers of America*, *supra*; *Robins v. Schonfeld*, 326 F. Supp. 525 (SDNY 1971); *Cefalo v. International Union of District 50 United Mine Workers*, 311 F. Supp. 946 (DC 1970); *Sands v. Abelli*, 290 F. Supp. 677 (SDNY 1968). We must therefore conclude that an award of counsel fees to a successful plaintiff in an action under § 102 of the LMRDA falls squarely within the traditional equitable power of federal courts to award such fees whenever “overriding considerations indicate the need for such a recovery.” *Mills v. Electric Auto-Lite Co.*, *supra*, at 391–392.

II

This does not end our inquiry, however, for even where “fee-shifting” would be appropriate as a matter of equity, Congress has the power to circumscribe such relief. In *Fleischmann Distilling Corp. v. Maier Brewing Co.*, *supra*, for example, we held that § 35 of the Lanham Act, 60 Stat. 439, 15 U. S. C. § 1117, precluded an award of attorneys’ fees as a separate element of recovery in a suit for deliberate infringement of a trademark. In reaching that result, we reasoned that, since § 35 “meticulously detailed the remedies available to a plaintiff

¹³ Petitioners contend that the payment of counsel fees out of the union treasury might deplete union funds to such an extent as to impair the union’s ability to operate as an effective collective-bargaining agent and to endanger union stability. Although this consideration is undoubtedly an important one, it is relevant, not to the power of federal courts to award counsel fees generally, but, rather, to the exercise of the District Court’s discretion on a case-by-case basis. See n. 23, *infra*.

who proves that his valid trademark has been infringed," Congress must have intended "the express remedial provisions of § 35 "to mark the boundaries of the power to award monetary relief in cases arising under the Act." *Id.*, at 719, 721. Petitioners contend that this reasoning dictates a similar conclusion with respect to § 102 of the LMRDA. We do not agree. Unlike § 35 of the Lanham Act, which specifically "provided not only for injunctive relief, but also for compensatory recovery measured by the profits that accrued to the defendant by virtue of his infringement, the costs of the action, and damages which may be trebled,"¹⁴ § 102 of the LMRDA broadly authorizes the courts to grant "such relief (including injunctions) as may be appropriate." 29 U. S. C. § 412. Thus, § 102 does not "meticulously detail the remedies available to a plaintiff," and we cannot fairly infer from the language of that provision an intent to deny to the courts the traditional equitable power to grant counsel fees in "appropriate" situations.

Petitioners argue further, however, that because Congress expressly authorized the recovery of counsel fees in §§ 201 (c) and 501 (b) of the LMRDA, 29 U. S. C. §§ 431 (c), 501 (b), the absence of a similar express provision in § 102 indicates an intent to preclude "fee-shifting" in suits brought under that section. Sections 201 (c) and 501 (b), which are not a part of Title I, deal with narrowly defined problems under the Act, and specifically authorize such limited remedies as an examination of the union's books and records and an accounting.¹⁵ By contrast, § 102 was premised upon the fact

¹⁴ *Fleischmann Distilling Corp. v. Maier Brewing Co.*, *supra*, at 719.

¹⁵ Section 201 (c) provides for the award of counsel fees in a suit brought by a union member to obtain access to union books, records, and accounts to verify annual financial statements. 29 U. S. C. § 431 (c). Section 501 (b) authorizes "fee shifting" in a suit brought

1

Opinion of the Court

that Title I litigation necessarily demands that remedies "be tailored to fit facts and circumstances admitting of almost infinite variety,"¹⁶ and § 102 was therefore cast as a broad mandate to the courts to fashion "appropriate" relief. Indeed, any attempt on the part of Congress to spell out all of the remedies available under § 102 would create the "danger that those [remedies] not listed might be proscribed with the result that the courts would be fettered in their efforts to 'grant relief according to the necessities of the case.' " *Gartner v. Soloner*, 384 F. 2d 348, 353 (CA3 1967). See *Fleischmann Distilling Corp. v. Maier Brewing Co.*, *supra*. Confronted with a virtually identical situation in *Mills*, we explained that the inclusion in certain sections of the Securities Exchange Act of 1934 of express provisions for recovery of attorneys' fees "should not be read as denying to the courts the power to award counsel fees in suits under other sections of the Act when circumstances make such an award appropriate" *Mills v. Electric Auto-Lite Co.*, *supra*, at 390-391. That reasoning is equally persuasive today.¹⁷

Finally, petitioners call our attention to two isolated comments in the legislative history of Title I—one by Senator Goldwater in his testimony before a House Com-

by a member against a union official to recover damages or for an accounting for the benefit of the union on the ground that the official is violating his duties. 29 U. S. C. § 501 (b).

¹⁶ *Gartner v. Soloner*, 384 F. 2d 348, 353 (CA3 1967).

¹⁷ Indeed, the *Mills* reasoning may be particularly appropriate with respect to the LMRDA. As Professor Cox has noted, "because much of the bill was written on the floor of the Senate or House of Representatives and because many sections contain calculated ambiguities or political compromises . . . , the courts would be well advised to seek out the underlying rationale without placing great emphasis upon close construction of the words," Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 Mich. L. Rev. 819, 852 (1960).

mittee¹⁵ and the other contained in a dissenting statement to a House Committee Report¹⁹—expressing the fear that, in the absence of a specific provision for the award of counsel fees, such relief would be unavailable in suits brought under § 102. Although these statements plainly indicate “a feeling by some members of the Congress that it would have been desirable and prudent to spell out unmistakably a right to attorney’s fees,” they “hardly amount to a definitive and absolute setting of the Congressional face against the giving of such incidental relief by the courts where compatible with sound and established equitable principles.” *Yablonski v. United Mine Workers of America*, 150 U. S. App. D. C., at 258, 466 F. 2d, at 429. See *Gartner v. Soloner*, 384 F. 2d, at 352. Indeed, both of these comments expressly favored the allowance of counsel fees in Title I litigation, and there is no suggestion anywhere in the

¹⁵ In his testimony before the House Committee on Education and Labor, after passage of the Senate version of the LMRDA, Senator Goldwater stated that “the bill does not grant [the union member], even where successful in his suit, reasonable counsel fees or other costs. It thus forces him to assume the entire financial burden of the litigation. For an ordinary rank-and-file union member who is generally a wage worker, such a litigation thus becomes an impossible financial burden.” 105 Cong. Rec. 10095 (1959).

¹⁹ In opposing the reporting of the Elliott bill, H. R. 8342, 86th Cong., 1st Sess. (1959), to the House, the nine dissenting Members of the House Committee on Education and Labor protested that “[u]nder that bill the individual member must shoulder the burden of litigation costs himself.” H. R. Rep. No. 741, 86th Cong., 1st Sess., 95 (1959). At the end of their criticisms of the Elliott bill, the dissenters explained that “[f]or the reasons outlined above, we intend to support . . . the so-called Landrum-Griffin bill (H. R. 8400 and 8401).” *Id.*, at 98. Thus, although the enforcement provisions of the Elliott bill and the Landrum-Griffin bill were virtually identical, the dissenters apparently believed that the latter, which eventually was enacted, allowed the union member to recover counsel fees.

1

Opinion of the Court

legislative history that even a single member of Congress was opposed to such relief or desired the words "such relief . . . as may be appropriate" to restrict the historic equity powers of the federal courts. On the contrary, there are numerous expressions by sponsors and other supporters of the Act indicating that § 102 was intended to afford the courts "a wide latitude to grant relief according to the necessities of the case,"²⁰ and "to give such relief as [the court] deems equitable under all the circumstances."²¹

Moreover, the award of attorneys' fees under § 102 is clearly consonant with Congress' express desire to adopt "legislation that will afford necessary protection of the rights and interests of employees and the public generally" 29 U. S. C. § 401 (b). As the Court of Appeals recognized:

"Not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose. It is difficult for individual members of labor unions to stand up and fight those who are in charge. The latter have the treasury of the union at their command and the paid union counsel at their beck and call while the member is on his own. . . . An individual union member could not carry such a heavy financial burden. Without counsel fees the grant of federal jurisdiction is but a gesture for few union members could avail themselves of it." 462 F. 2d, at 780-781.

Thus, it is simply "untenable to assert that in establishing the bill of rights under the Act Congress intended to have those rights diminished by the unescapable fact that

²⁰ 105 Cong. Rec. 15548 (1959) (Rep. Elliott).

²¹ *Id.*, at 6717 (Sen. Kuchel). See *id.*, at 15864 *et seq.* (Rep. O'Hara); see also 29 U. S. C. §§ 413, 523 (a).

an aggrieved union member would be unable to finance litigation" *Gartner v. Soloner, supra*, at 355. See *Yablonski v. United Mine Workers of America, supra*, at 259, 466 F. 2d, at 430; *Robins v. Schonfeld*, 326 F. Supp., at 531; *Sands v. Abelli*, 290 F. Supp., at 686; cf. *Newman v. Piggie Park Enterprises, Inc.*, 390 U. S., at 402. We therefore hold that the allowance of counsel fees to the successful plaintiff in a suit brought under § 102 of the LMRDA is consistent with both the Act and the historic equitable power of federal courts to grant such relief in the interests of justice.

III

Finally, petitioners maintain that the award of counsel fees to respondent under the facts of this case constituted an abuse of the District Court's discretion. Specifically, petitioners argue that the District Court's finding that some of respondent's actions "were, in part, motivated by [his] political ambitions for union office" represents a finding of "bad faith" on the part of respondent. The District Court clearly rejected the "logic" of this contention, and we agree. Title I of the LMRDA was specifically designed to protect the union member's right to seek higher office within the union,²² and we can hardly accept the proposition that the exercise of that right is tantamount to "bad faith." See *Yablonski v. United Mine Workers of America, supra*, at 259-260, 466 F. 2d, at 430-431.

²² In describing to the Senate the various "offenses" for which a union member could be expelled under then-existing union constitutions, Senator McClellan pointed out in particular the "offense" of "applying for the position of another union man in office." He observed, with evident sarcasm, that: "A member had better not do that. The officers have squatters' rights. Members had better not offer any competition. They had better not seek election. They had better not aspire to the presidency or the secretaryship, or they will be expelled or disciplined." 105 Cong. Rec. 6478 (1959).

1

Opinion of the Court

Petitioners also contend that the award of attorneys' fees in this case was improper because the District Court, in denying respondent's claim for punitive damages, found that "the defendants, in good faith, believed that they had a right to charge and discipline [respondent] for his actions." It is clear, however, that "bad faith" may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation. And, as the Court of Appeals noted, the conduct of this particular litigation was marked by "the dilatory action of the union and its officers" 462 F. 2d, at 780. Moreover, although the presence of "bad faith" is essential to "fee-shifting" under a "punishment" rationale, neither the presence nor absence of "bad faith" is in any sense dispositive where attorneys' fees are awarded to the successful plaintiff under the "common benefit" rationale recognized in *Mills* and operative today. Under that theory, counsel fees are granted, not because of the "bad faith" of the defendant but, rather, because the litigation confers substantial benefits on an ascertainable class of beneficiaries. In that situation, the element of "bad faith" of the defendant is simply one of many considerations best addressed to the sound discretion of the District Court.²³ Under the facts of this case, we cannot say that the District Court abused that discretion.

The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

²³ Another such consideration is, of course, the extent to which the payment of the plaintiff's counsel fees out of the union treasury might impair the union's ability to operate effectively. See n. 13, *supra*. Here, petitioners do not, and indeed cannot, contend that the award of only \$5,500 would in any sense jeopardize union stability.

WHITE, J., dissenting

412 U.S.

MR. JUSTICE WHITE, with whom MR. JUSTICE REHNQUIST joins, dissenting.

I would need a far clearer signal from Congress than we have here to permit awarding attorneys' fees in member-union litigation, which so often involves private feuding having no general significance. The award of fees in the occasionally successful and meritorious case will not be worth the litigation the Court's decision will invite and foster.

United States Court of Appeals, Fifth Circuit, Aug. 29, 1972.

No. 71-3186.

ROBERT J. COOPER, PLAINTIFF-APPELLANT,

VS.

IVAN ALLEN, JR., MAYOR OF THE CITY OF ATLANTA, GA., ET AL., DEFENDANTS-APPELLEES

Rehearing and Rehearing En Banc Denied Oct. 5, 1972.

Suit in which plaintiff alleged that use of test to reject his 1969 application for golf pro violated his civil rights. The United States District Court for the Northern District of Georgia, Albert J. Henderson, Jr., J., entered judgment, and plaintiff appealed. The Court of Appeals, Rives, Circuit Judge, held that where plaintiff contended that test served to discriminate in 20 job categories, it would be unreasonable to require employer in a single lawsuit to show that test accurately predicted performance in each and factual issues were too diverse to warrant class treatment, and that where city's discrimination against plaintiff who sought employment as golf pro was not intentional, plaintiff was entitled to back pay and individual injunctive relief unless the city could show by clear and convincing evidence that he would not have been hired even absent the discriminatory testing requirement and further held that where district judge held that test disqualified a disproportionate number of blacks seeking employment as golf pros and that test did not bear a substantial relationship to applicant's performance in that job and he enjoined use of test with respect to hiring of city golf pros, district court on remand had to articulate specific and justifiable reasons for denial of attorneys' fees or make a reasonable award.

Remanded with instructions.

1. CIVIL RIGHTS 9.13

Correlation between test and job need be present only where it is shown that use of test serves to discriminate. 42 U.S.C.A. § 1981.

2. CIVIL RIGHTS 13.13(1)

Federal Civil Procedure 181

Where there was no evidence of intentional discrimination on part of city, plaintiff's complaint had to be that implementation of test did in fact disqualify more blacks than whites from job and should be banned regardless of presence or absence of intent to disqualify a disproportionate number of blacks and to meet the challenge city had to show with respect to each job category at issue that test was substantially related to one's performance in position sought, and class treatment for all 20 job classifications under attack was inappropriate. 42 U.S.C.A. § 1981.

3. CIVIL RIGHTS 1313(1)

There is no requirement that prior to implementation of an intelligence test as an employment criterion the employer must validate its ability to forecast job performance; rather, once plaintiff shows a discriminatory effect, burden shifts to defendant to prove the test's validity

4. FEDERAL CIVIL PROCEDURE 184

Where plaintiff contended that test served to discriminate in 20 job categories, it would be unreasonable to require employer in a single lawsuit to show that test accurately predicted performance in each and factual issues were too diverse to warrant class treatment. 42 U.S.C.A. § 1981.

5. FEDERAL CIVIL PROCEDURE 184

City's admitted failure to take into account any cultural or educational deficiency on part of blacks in evaluating meaning of their test scores for job did not mean that class relief was proper and it would be inappropriate to require city in a single suit to substantiate test's relationship to all 20 job classifications in question. 42 U.S.C.A. § 1981.

6. CIVIL RIGHTS 132(1), 13.17

Where city's discrimination against plaintiff who sought employment as golf pro was not intentional, plaintiff was entitled both to back pay and individual injunctive relief unless the city could show by clear and con-

vincing evidence that he would not have been hired even absent the discriminatory testing requirement. 42 U.S.C.A. § 1981.

7. COURTS 406.9 (17)

Where district judge held that test disqualified a disproportionate number of blacks seeking employment as golf pros and that test did not bear a substantial relationship to applicant's performance in that job and he enjoined use of test with respect to hiring of city golf pros, district court on remand had to articulate specific and justifiable reasons for denial of attorneys' fees or make reasonable award 42 U.S.C.A. § 1981.

Elizabeth Rindskopf, Howard Moore, Jr., Atlanta, Ga., Jack Greenberg, William L. Robinson, New York City, Michael H. Terry, Atlanta, Ga., Robert N. Dokson, Cambridge, Mass., for plaintiff-appellant.

Robert S. Wiggins, Henry L. Bowden, Atlanta, Ga., for dependants-appellees.

Before RIVES, BELL and MORGAN, Circuit Judges.

RIVES, Circuit Judge:

In 1966 appellant Cooper, a Negro, applied for a position as one of Atlanta's municipal golf pros. At that time no form of intelligence testing was employed by the City. Cooper was not hired. Sometime thereafter the City began to require a certain score on the Otis-Lennon Mental Ability Test, Form J, as a prerequisite to employment as a golf pro. In addition an applicant had to satisfy other requisites. In 1969 a golf pro slot opened. Cooper applied. He was compelled to take the Otis test which he failed. As a consequence his application was denied.¹

Cooper filed a class action in federal district court alleging violations of 42 U.S.C. § 1983 and of Title VII of the Civil Rights Act. (The Title VII claim was not maintainable since Cooper had failed to comply with the conciliatory requirements of that statute.) In Count I of his complaint he alleged that the City's failure to hire him in 1966 was motivated by racial prejudice. The district court found no evidence of such discriminatory intent and denied relief. Cooper does not appeal from that judgment. In Count II Cooper alleged that use of the Otis test to reject his 1969 application violated his civil rights. The district court found jurisdiction under 42 U.S.C. § 1981 rather than under § 1983.

Cooper filed his Count II class action on behalf of all Negroes, no matter for what job they had applied, who were denied jobs with the City on account of failure to pass the Otis test. At the time of his suit the City used the test as a prerequisite to 19 positions other than that of golf pro.² The district court held the class which Cooper had drawn to be "unreasonably diverse" in that "there are too many uncommon questions of law and fact." The judge therefore limited the class to all Negroes, past, present and future, who have made or will make application for a position as golf pro.

[1] Having limited the class the district court proceeded to the merits. The district judge found that although *Griggs v. Duke Power Co.*, 1971, 401 U.S. 424, 91 St.Ct. 849, 28 L.Ed.2d 158, involved a Title VII challenge to testing practices, a challenge which could not be maintained, it could still be said that "Where no Title VII issues are involved * * * and a suit merely alleges a claim under section 1981, the court finds that the actual test used by the employer must bear a substantial relationship to the demands of the work to be performed." Accord, *Arrington v. Massachusetts Bay Transportation Auth.*, D. Mass. 1969, 306 F.Supp. 1355. Of course correlation between the test and the job need be present only where it is shown that use of the test serves to discriminate. The district court then found that the effect of utilizing the Otis test disqualified a disproportionate number of blacks seeking to be hired as golf pros. Finally, it concluded that the test did not bear a "substantial relationship to the demands of the work to be performed."

¹ The parties have stipulated that Cooper's application received no further consideration after he registered a failing test score. (Pretrial Stipulation No. (8)).

² The positions were as follows: (1) Artist; (2) Assistant Manager of Computer Operations; (3) Budget Analyst; (4) Evaluation Analyst; (5) Fireman; (6) Police Patrolman; (7) Research Specialist; (8) Senior Systems Analyst; (9) System Analyst; (10) Assistant Curator; (11) Superintendent of Golf Courses; (12) Computyper Operator; (13) Assistant Airport Manager; (14) Social Planning Coordinator; (15) Filed Personnel Assistant; (16) Communications Clerk; (17) Supervisor of Publications; (18) Production Manager; (19) School Data Liaison Assistant.

Accordingly, use of the Otis test to evaluate golf pro candidates was permanently enjoined. Cooper also requested back pay from the date on which he was disqualified as a consequence of failing the Otis test and an order requiring the City to hire him for the next available golf pro position. The court denied such relief. The district judge also denied Cooper's prayer for attorneys' fees and ordered that costs be taxed one-half to Cooper and one-half to the defendants.

Cooper appeals, alleging that the district court erred in refusing:

- (1) To allow him to maintain his suit on behalf of all Negroes applying for any of the 19 jobs other than golf pro for which the City required the taking and passing of the Otis test;
- (2) To award back pay;
- (3) To order the City to hire him for the next available golf pro position;
- (4) To award attorneys' fees; and
- (5) To tax all costs to the defendants.

We affirm in part, reverse in part, and remand for an evidentiary hearing.

I. Class Action.

Cooper contends that the district court erred in narrowing the class for any of the following three reasons: (1) Since he alleges that the City has intentionally discriminated in all 20 of the job positions, there is but one legal and factual issue; (2) the City's use of the Otis test without first having undertaken to validate its relevancy to each of the 20 job classifications is itself a violation of the law giving rise to a cause of action; and (3) the City's admitted failure to take into account any cultural or educational deficiency on the part of Negroes in evaluating the meaning of their test scores violates the instructions of the Otis test, and therefore use of the test scores for Negroes is invalid. Each of these arguments is without merit.

[2] (1) First, the record does not support a finding that the City has intentionally discriminated in its hiring policies with respect to any of the 20 job classifications. Cooper cites cases in support of his theory such as *Jenkins v. United Gas Co.*, 5 Cir. 1968, 400 F.2d 28, in which we allowed a class suit seeking redress for plant-wide racially discriminatory practices. But in that case, and in the others referred to by Cooper, there was evidence that the employer had intentionally discriminated against blacks. Consequently, the employer asserted but one defense, that he did not intentionally discriminate. Here there is no evidence of intentional discrimination on the part of the City. In the absence of such evidence, Cooper cannot successfully challenge the Otis test on a theory that the City of Atlanta used such test with the intent to disqualify a disproportionate number of blacks. Rather, his complaint must be that implementation of the test does in fact disqualify more blacks than whites and that as such it should be banned regardless of the presence or absence of such intent. To meet such challenge, the City must show with respect to each job category at issue that the test is substantially related to one's performance in the position sought. Necessarily, then, such a showing must be made for each of the 20 job classifications under attack. Class treatment for all 20 job classifications seems inappropriate.

[3, 4] (2) Next Cooper argues that the Otis test may be presumed invalid because the City did not, prior to its implementation, undertake a study to validate its ability to forecast an applicant's performance in each of the 20 jobs at issue. Hence, says Cooper, "the factual propositions are identical: the same test are [sic] being used as an employment criterion, in each category no prior validation studies have been conducted * * * to demonstrate a correlation between test performance and predictability of job performance, and the statistics concerning the test as used in each of the nineteen relevant job categories [i.e., those other than golf pro] clearly showed adverse impact on Blacks." (Appellant's Brief at 22-23.) In effect, Cooper contends that class relief automatically flows from the City's failure to conduct a study of the Otis test's predictive integrity prior to its implementation. Even assuming the record supports a finding that use of the test adversely affects blacks across the board, Cooper's argument fails. He labors under a misapprehension of the law. There is no requirement that prior to implementation of an intelligence test as an employment criterion the employer must validate its ability to forecast job performance. Rather, one plaintiff shows a discriminatory effect, the burden shifts to defendant to prove the test's

validity. Where, as in this case, the plaintiff contends that a test serves to discriminate in 20 job categories, it would be unreasonable to require the employer, in a single law suit, to show that the test accurately predicts performance in each. As the district court concluded, the factual issues are too diverse to warrant class treatment.

[5] (3) Finally, Cooper contends that, since the City has disregarded certain instructions accompanying the Otis class relief is proper. The Manual of Instructions to the Otis test states in effect that the tester should not expect the same score from one who is culturally or educationally deprived as from one who is culturally or educationally enriched. The City admits that when considering a black applicant it does not consider that blacks are often deprived in these respects. However, failure to consider this alleged inequality among applicants does not relate to the class action issue. The law does not require lower standards of employment for blacks. If the test is substantially related to the demands of the job and no black can pass the test, an employer need not hire any blacks. Again the issue distills into whether one's performance on the Otis test is substantially related to his performance in each of the 20 job categories under scrutiny. As we have said, it would be inappropriate to require the City in a single unit to substantiate the test's relationship to all 20 of the job classifications.

In view of the foregoing considerations, we affirm the district court's judgment that Cooper not be allowed to maintain a class action challenging the 19 job categories other than that of golf pro.

II. Back Pay and Individual Injunctive Relief.

The district judge held that the Otis test disqualified a disproportionate number of blacks seeking employment as golf pros and that the test did not bear a substantial relationship to the applicant's performance in that job. Accordingly, he enjoined use of the test with respect to the hiring of City golf pros. Neither Cooper nor the City contests that holding. Cooper does complain of the district court's refusal to award him back pay and of the court's failure to order the City to hire him for the next available golf pro position.

[6] In refusing back pay, the district court reasoned:

"Because of the insufficiency of the evidence produced by and on behalf of [Cooper], the court is unable to hold that he would have been employed in 1969 had the City not relied on the results of the Otis Test in considering his application. In other words, the evidence simply does not support a conclusion that, had the Otis Test not been used, he would have been the *most* qualified applicant for the position (since there was only one vacancy to be filled)."

(Emphasis in original.) The judge seemingly denied individual injunctive relief on the same rationale. While it is true that, since there was only one job opening at the time Cooper sought employment in 1969, he is entitled to back pay only if he was the most qualified applicant, the district court erred in placing the burden of proof on Cooper. We have already determined that the City's discrimination against him was not intentional. In such circumstances, Cooper is entitled both to back pay and individual injunctive relief unless the City can show by clear and convincing evidence that he would not have been hired³ even absent the discriminatory testing requirement. See *Rolfe v. County Board of Education*, 6 Cir. 1968, 391 F.2d 77, 80; *Hill v. Franklin County Board of Education*, 6 Cir. 1968, 390 F.2d 583, 585; *Wall v. Stanley County Bd. of Ed.*, 4 Cir. 1967, 378 F.2d 275; *Smith v. Board of Education*, 8 Cir. 1966, 365 F.2d 770; *Williams v. Kimbrough*, W. D.La., 295 F.Supp. 578, *aff'd* 5 Cir. 1969, 415 F.2d 874.

It was in 1969 that Cooper applied for the job and was required to take the Otis test. At that time the City imposed four requirements for employment as a golf pro other than a satisfactory test score: The applicant must (1) be between the ages of 25 and 40; (2) have at least 5 years' experience as a golf pro or as an assistant golf pro; (3) possess Class A membership in the PGA, or eligibility therefor; and (4) successfully complete an oral interview. On remand the City must prove by clear and convincing evidence that, in the light of the numerated qualifications, Cooper would not have been

³ Since there was but one job opening at the time Cooper applied for the job in 1969, the City's burden, in proving that Cooper would not have been hired anyway, is to show that Cooper was not the most qualified applicant.

entitled to the job even had there been no requirement to take and pass the Otis test. That is, the City must show that the person actually hired was on the whole better qualified for the job.

On this appeal the City contends that, in 1969, Cooper did not meet even the minimum qualifications because he lacked the requisite 5 years' experience as a golf pro or as an assistant golf pro. Assuming that Cooper did not have such experience (the Record is unclear), it is for the district court to determine whether that factor would have absolutely disqualified Cooper. If, for example, the person actually hired for the position in 1969 did not possess the requisite 5 years' experience, or if any other applicant deemed qualified and allowed to compete for the position lacked that experience, then of course a showing that Cooper did not have such experience would not satisfy the City's burden of proof.

III. Attorneys' Fees.

[7] Ordinarily, whether to award attorneys' fees is in the sound discretion of the trial judge, and a denial of attorneys' fees is overturned only upon a showing of abuse discretion. However, in *Newman v. Piggie Park Enterprises, Inc.*, 1968, 390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263, the Supreme Court narrowed the trial judge's discretion:

"If success plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to be unenforceable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II.

"It follows that one who succeeds in obtaining an injunction under that Title should ordinarily recover attorney's fee unless special circumstances would render such an award unjust."

Admittedly, *Newman* involved a suit brought under a civil rights statute which makes specific allowance for attorneys' fees. But in *Lee v. Southern Home Sites Corp.*, 5 Cir. 1970, 429 F.2d 290, this Court extended the *Newman* doctrine to section 1982 suits. There is no relevant distinction between a section 1982 suit and a section 1981 suit such as this one. See *Jones v. Alfred H. Mayer Co.*, 1968, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189. Moreover, in *Lee* this Court said that, when a court refused attorneys' fees in a 1982 suit (and by analogy in a 1981 suit), it must set out the findings of fact and grounds upon which its refusal rests.

If on remand the district court cannot articulate specific and justifiable reasons for its denial of attorneys' fees, it should make a reasonable award.

CONCLUSION

The judgment below is affirmed insofar as the district court narrowed the class of plaintiffs to all present and potential black applicants for the position of City golf pro who were or will be required to take and pass the Otis test as a prerequisite to employment. We remand this case to the district court for the City to undertake to prove by clear and convincing evidence that at the time Cooper sought employment in 1969 he would not have been hired even absent the testing requirement. If the City fails its burden of proof the district court should award back pay and individual injunctive relief. If on remand the district court should continue in its refusal to award attorneys' fees, it is instructed to articulate specific reasons for such action. In light of this opinion the district court should also feel free to reassess costs.

Remanded with instructions.

On petition for rehearing and petition for rehearing en banc

PER CURIAM:

The Petition for Rehearing is denied and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is denied.

LA RAZA UNIDA ET AL., PLAINTIFFS,
v.
JOHN A. VOLPE ET AL., DEFENDANT.

Action by private citizens against Secretary of Transportation, California Highway Department, California Department of Public Works and chief highway engineer of the state of California, to enjoin construction of state highway project. The injunction was granted, 337 F.Supp. 221. On motion for award of attorneys' fees and expert witness fees, the District Court, Peckham, J., held that where successful action resulted in the effectuation of strong public policies of environmental protection and housing assistance, numerous people received benefits from the litigation, only a private party could have brought the action and an award of attorneys' fees would come from the state treasury, District Court would exercise its equitable power to award attorneys' fees, even though statutes which were the basis of the injunctive relief did not specifically provide for awarding of fees.

Motions granted.

1. FEDERAL CIVIL PROCEDURE 2737

While general American rule is that attorneys' fees are not ordinarily recoverable as costs, absent express statutory authorization, there are exceptions for situations in which "overriding considerations" indicate the need for such recovery.

2. FEDERAL CIVIL PROCEDURE 2737

The power to grant attorneys' fees springs from the equitable powers of the court.

3. FEDERAL CIVIL PROCEDURE 2737

In "obdurate behaviour" situation in which a defendant has behaved in bad faith, a court may use its equitable powers to assess attorneys' fees against the defendant.

4. FEDERAL CIVIL PROCEDURE 2737

In a "common fund" situation the courts may use their equitable powers and award attorneys' fees in order to insure that beneficiaries of litigation are the ones who share the expense and to prevent the unjust enrichment of "free riders."

5. FEDERAL CIVIL PROCEDURE 2737

When a plaintiff acts as "private attorney general," the courts may use their power to grant attorneys' fees offensively when necessary and appropriate to insure the effectuation of strong congressional policy. Department of Transportation Act, § 4(f), 49 U.S.C.A. § 1653(f).

6. FEDERAL CIVIL PROCEDURE 2737

Whenever there is nothing in statutory scheme which might be interpreted as precluding it, a "private attorney general" should be awarded attorneys' fees when he has effectuated strong congressional policy which has benefited large class of people, and the necessity and financial burden of private enforcement are such as to make the award essential.

7. FEDERAL CIVIL PROCEDURE 2737

Whether to award attorneys' fees to "private attorney general" is addressed to sound discretion of the trial court and turns on such factors as the strength of the congressional policy, the number of people benefited by the litigants' efforts, and the necessity and financial burden of private enforcement.

8. FEDERAL CIVIL PROCEDURE 2737

Where successful action by private citizens to enjoin construction of proposed state highway project resulted in the effectuation of strong public policies of environmental protection and housing assistance, numerous people received benefits from the litigation, only a private party could have brought the action and an award of attorneys' fees would come from the state treasury, district court would exercise its equitable power to award attorneys' fees, even though statutes which were the basis of the injunctive relief did not specifically provide for awarding of fees. Department of Transportation Act, § 4(f), 49 U.S.C.A. § 1653(f).

9. STATES 4.11

The state may no more immunize the individual from costs incident to issuance of an injunction than it may insulate him from the injunction itself.

10. FEDERAL CIVIL PROCEDURE 2737

Sovereign immunity did not bar award of attorneys' fee against chief engineer of state highway department in action by private citizens to enjoin the construction of state highway project. U.S.C.A.Const. Amend. 11; Department of Transportation Act § 4(f), 49 U.S.C.A. § 1653(f); West's Ann.Cal. Gov.Code, § 825 et seq.

11. FEDERAL CIVIL PROCEDURE 2737

Congressional silence is not bar to awarding of attorneys' fees as court possesses within its equity jurisdiction the power to award fees.

12. FEDERAL CIVIL PROCEDURE 2741

Where affidavits of private citizens' expert witnesses were helpful to the court and were crucial part of the citizens' presentation in action to enjoin construction of state highway project, the citizens, who prevailed, were entitled to reimbursement from the state for their expert witness fees. U.S.C.A. Const. Amend. 11; Department of Transportation Act, § 4(f), 49 U.S.C.A. § 1653(f); West's Ann.Cal.Gov.Code, § 825 et seq.

J. Anthony Kline, Ellen Cummings, Public Advocates, Inc., San Francisco, Cal., for plaintiffs.

James L. Browning, Jr., U.S. Atty., Francis B. Boone, Asst. U.S. Atty., San Francisco, Cal., Harry S. Fenton, Robert F. Carlson, Kingsley T. Hoegstedt, Sacramento, Cal., John P. Horgan, Norval Fairman, Robert R. Buell, Donald M. Velasco, San Francisco, Cal., for defendants.

MEMORANDUM OF DECISION

PECKHAM, District Judge.

Plaintiffs in this environmental protection and housing assistance case originally brought suit to enjoin the construction of California Highway Project 238.¹ The injunction was granted on the grounds that the defendants failed to comply with § 4(f) of the Department of Transportation Act of 1966 and various sections of 23 U.S.C. dealing with housing displacement and relocation. Plaintiffs now move for the awarding of attorneys' fees, against defendants, the California Highway Department, California Department of Public Works, and J. A. Legarra, Chief Highway Engineer, State of California, in his individual and representative capacity.

[1] While the general American rule is that attorneys' fees are not ordinarily recoverable as costs absent an express statutory authorization, the courts have developed exceptions to this rule for situations in which "overriding considerations" indicate the need for such a recovery. *Mills v. Electric Auto-Lite*, 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970).² The statutes which were the basis of the relief on the merits in *La Raza* do not specifically

¹ See *La Raza Unida, et al. v. Volpe, et al.*, 337 F.Supp. 221 (N.D.Cal.1971).

² Several commentators have argued for either a major revision or an outright rejection of this rule. See Ehrenzweig, "Reimbursement of Counsel Fees and the Great Society," 54 Calif.L.Rev. 792 (1966); Juenzel, "The Attorney's Fee: Why Not a Cost of Litigation?" 49 Iowa L.Rev. 75 (1963); McCormick, "Counsel Fees and Other Expenses of Litigation as an Element of Damages," 15 Minn. L.Rev. 619 (1931); Stoebe, "Counsel of Fees Included in Costs: A Logical Development," 38 U.Colo.L.Rev. 202 (1966).

provide for the awarding of fees; hence, we must consider whether this case falls within a judge-created exception to the American rule.

[2] The *power* to grant attorneys' fees springs from the equitable powers of the court. *Sprague v. Ticonic Nat. Bank*, 307 U.S. 161, 166, 59 S.Ct. 777, 83 L.Ed. 1184 (1939). The basic issue in the present motion is whether plaintiffs have demonstrated that equity compels the awarding of fees in this case. Through the use of their equitable powers courts have carved out several exceptions to the American rule of *not* granting attorneys' fees absent statutory authorization.

[3] 1) The "obdurate behaviour" situation. Here the courts use their equitable powers to impose costs on defendants who behaved in bad faith. See, *e.g.*, *Kahan v. Rosenstiel*, 424 F.2d 161, 167 (3rd Cir. 1970), cert. denied, *Glen Alden Corp. v. Kahan*, 398 U.S. 950, 90 S.Ct. 1870, 26 L.Ed.2d 290 (1970); *Knight v. Auciello*, 453 F.2d 852 (1st Cir. 1972).

[4] 2) The "common fund" situation. Here the courts use their equitable powers to insure that the beneficiaries of litigation are the ones who share the expense. This is a defensive use of the equitable power of the courts to prevent the unjust enrichment of "free riders". See, *e.g.*, *Sprague v. Ticonic Nat. Bank*, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184 (1939).

[5] 3) The "private attorney general" situation. Here the courts use their power offensively when necessary and appropriate to insure the effectuation of a strong Congressional policy. See *e.g.*, *Sims v. Amos*, 340 F.Supp. 691 (M.D. Ala. decided March 17, 1972); *cf.* *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968).

Doubtless some cases defy categorization into one of the three categories, perhaps the present case is one, but the categories provide useful tools for analysis.

1. *The obdurate behavior situation.*

The first exception, the "obdurate behavior" or "bad faith" situation, does not apply to this case. In its memorandum and order the court specifically found that the State Highway Department did not behave in bad faith:

"From the evidence thus far presented it also appears that, *despite sincere efforts*, the State has an inadequate relocation assistance program, as defined by § 205 of the Uniform Relocation Assistance Act of 1970 and IM 80-1-71. The State, *albeit in good faith*, has failed to comply with the federal relocation statutes and regulations." (emphasis added).
337 F.Supp. at 233.

The same findings apply to the environmental aspect of the case. *La Raza* involved complicated legal questions; by no means were the duties of the state clear, and the court affirms its earlier findings that the State did not behave in bad faith. Our concern here is with those situations where the defendants' errors and conduct fall short of obdurate behavior.

2. *The common fund situation.*

The second exception is the common fund "situation". In *Sprague v. Ticonic Nat. Bank*, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184 (1939), the U.S. Supreme Court held that attorneys' fees can be awarded when the judgment results in a "common fund" for the plaintiffs or for the class. That is to say, when the plaintiffs' efforts result in substantial benefits to others, these "free riders"—those who receive significant benefits without paying for them—should compensate the plaintiffs for the benefits the latter has conferred upon them. The Supreme Court has more recently elaborated on the inequity of "free riders" in a litigation context:

"To allow the others to obtain full benefit from the plaintiffs' efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense." *Mills v. Electric Auto-Lite*, 396 U.S. 375, 392, 90 S.Ct. 616, 625, 24 L.Ed.2d 593 (1970).

In other words the "free-riders" situation is an appropriate one for the Court to exercise its equitable powers to award attorneys' fees

The plaintiffs in *Mills* were certain shareholders in Electric Auto-Lite Company who alleged that a merger had been accomplished through the use of a misleading proxy statement. A group of shareholders brought a derivative action to have the merger set aside and eventually prevailed on the merits. The Supreme Court approved the awarding of attorneys' fees despite the absence of any statutory authorization by utilizing the common-fund approach.

The Court stated that attorneys' fees can be awarded "where the litigation has conferred a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them." 396 U.S. at 393, 90 S.Ct. at 626.

Mills extended the scope of the common-fund justification for the awarding of fees by holding that no *pecuniary benefit need be demonstrated*. 396 U.S. at 393, 90 S.Ct. 616. In so doing it has become exceedingly difficult to trace the benefits of litigation to their ultimate beneficiaries, so as to apportion the attorneys' fees amongst them.³ Because of the attendant difficulties in determining the ultimate beneficiaries, the "common fund" mold simply does not fit the present situation. As Judge Merhige stated in *Bardley v. School Board of the City of Richmond, Virginia*, 53 F.R.D. 28, 35 (E.D.Va.1971), wherein he rejected the common fund theory as a basis for awarding attorneys' fees in a school desegregation case: "School desegregation cases, or any suits against governmental bodies, do not fit this fund model without considerable cutting and trimming."

Consequently, the Court finds it is difficult in this case to support an award of attorney's fees under the common-fund theory.

3. The "private attorney general" situation.

In finding the required substantial benefit in *Mills*, the Court said: "[T]he stress placed by Congress on the importance of fair and informed corporate suffrage leads to the conclusion that, in vindicating the statutory policy, petitioners have rendered a substantial service to the corporation and its shareholders." 396 U.S. at 396, 90 S.Ct. at 627. The Court found that this type of "corporate therapeutics" by private stockholders as "providing an important means of enforcement of the proxy statute." 396 U.S. at 396, 90 S.Ct. at 628. *Mills*, then represents both the defensive and offensive use of the Court's equitable powers. Defensive, to prevent unjust enrichment of free riders and offensive, to promote the effective implementation of the Congressional objective of fair and informed corporate suffrage.⁴

[6] Two distinguished federal judges relying partially on *Mills* have put forward a third ground for the awarding of attorneys' fees: the plaintiff as "private attorney-general." See *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971), (opinion of Wisdom, J.); *NAACP v. Allen*, 340 F. Supp. 703, (M.D.Ala. 1972) (opinion of Johnson, J.). See also *Sims v. Amos*, 340 F.Supp. 691⁵ (M.D.Ala. 1972). The rule briefly stated is that whenever there is nothing in a statutory scheme which might be interpreted as precluding it, a "private attorney-general" should be awarded attorneys' fees when he has effectuated a strong Congressional policy which has benefited a large class of people, and where further the necessity and financial burden of private enforcement are such as to make the award essential.⁶

³ In this regard see, *Bright v. Philadelphia-Baltimore-Washington Stock Exchange*, 327 F.Supp. 495, 506 (E.D.Pa. 1971) Plaintiff was a broker who sued the stock exchange and its Board of Directors for alleged violations of the SEC Act of 1934. Plaintiff was denied a place on the Board of Directors of the Stock Exchange, mainly as a result of some questionable procedures. After granting plaintiff injunctive relief on the merits the court awarded attorney's fees, holding that the entire exchange and its members "benefitted" from plaintiff's efforts. In *Brewer v. School Board of the City of Norfolk, Virginia*, 456 F.2d 943, (4th Cir. 1972) (en banc), the majority of the circuit found no bad faith by the school board, the usual ground for awarding attorneys' fees in school desegregation cases. See, e. g., *Bell v. School Board of Powhatan County, Virginia*, 321 F.2d 494 (4th Cir. 1963); *Bradley v. School Board of City of Richmond, Virginia*, 345 F.2d 310 (4th Cir. 1965), remanded on other grounds, 382 U.S. 103, 86 S.Ct. 224, 15 L.Ed.2d 187. Nevertheless the Fourth Circuit did award attorneys' fees under a common fund theory. The relief granted on the merits included a provision that the school board supply free transportation to students forced to travel outside their neighborhood. The court of appeals held that many of the public school students of Norfolk had therefore received a benefit from the litigation, which the court chose to label a "pecuniary" benefit.

⁴ Note, "The Allocation of Attorneys' Fees After *Mills v. Electric Auto-Lite Co.*" 38 U.Chi.L.Rev. 316 (1971)

⁵ Another federal judge, in a scholarly examination of the complex considerations in school desegregation cases, seems to accept the premises of this rule, and indicates a readiness to accept the conclusions as well. See *Bradley, supra* (opinion of Merhige, J.)

⁶ The fact that attorneys in this action, Public Advocates, Inc., require no fees from their clients or that they receive tax-exempt foundation money is not germane to their status as private attorneys-general. See *Miller v. Amusement Enterprises, Inc.*, 426 F.2d 534 (5th Cir. 1970). We cannot presume Congress intended to rely on tax-exempt foundations to fund costs of litigation in order to effectuate its policies, nor that such funding will continue in the future.

In a recent case interpreting *Mills*, the Court of Appeals for the District of Columbia in *Yablonski v. United Mine Workers*, 466 F.2d 424 (D.C.Cir. 1972) reversed a lower court's refusal to award attorney fees in four separate actions. Each of the actions contained certain alleged violations of various provisions of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401ff. *Yablonski* like *Mills* defies categorization. It is a defensive use of the court's equitable powers as it attempts to spread the costs of securing union democracy over the union membership, but an offensive use in that it provides an effective method of implementing the Congressional policy of advancing union democracy.

More recently the Fifth Circuit has reaffirmed Judge Wisdom's conclusion that the awarding of attorney fees are proper when the plaintiff seeks to effectuate a strong Congressional policy. *Cooper v. Allen*, 467 F.2d 836 (5th Cir. decided August 29, 1972).⁷ Neither obdurate behavior nor a common fund was present. But because the trial court failed to articulate the basis of the denial of attorney fees, the Court remanded with instructions that the award should be made pursuant to *Lee*, *supra*, unless the trial court can set forth specific reasons for the denial.

[7] *Mills* does not give the federal courts license to award attorneys' fees in all cases. *Lee*, 444 F.2d at 145. See e.g., *Fleishman Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 87 S.Ct. 1404, 18 L.Ed.2d 475 (1967). The matter is addressed to the sound discretion of the trial court and turns on such factors as the strength of the Congressional policy, the number of people benefited by the litigants' efforts, and the necessity and financial burden of private enforcement.

a) The effectuation of strong Congressional policies—Few public policies are accorded the weight and priority of those present in this lawsuit. See the discussion of this point in *La Raza Unida v. Volpe*, 337 F.Supp. 221, 226–228, (N.D.Cal.1971). The Court could cite numerous judicial and legislative utterances that dramatically portray the strength of these public policies, but the following will serve as examples:

On relocation assistance:

That congressional command [23 U.S.C. 138 and Section 4(f) of the DOT Act] should not be taken lightly by the Secretary or this Court. It represents a solemn determination of the highest law-making body of this Nation that the beauty and health-giving facilities of our parks are not to be taken away for public roads without hearings, fact-findings, and policy determinations under the supervision of a Cabinet officer—the Secretary of Transportation. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971) (opinion Black, J., concurring).

On relocation assistance:

Congress hereby declares that the prompt and equitable relocation and reestablishment of persons, businesses, farmers, and nonprofit organizations displaced as a result of the Federal highway programs and the construction of Federal-aid highways is necessary to insure that a few individuals do not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole. Therefore, Congress determines that relocation payments and advisory assistance should be provided to all persons so displaced in accordance with the provisions of this title.

Section 201 of Title II of the Uniform Relocation Assistance and Land Acquisition Policies Act provides as follows:

⁷ Judge Rives, speaking for the Court, relies partially on dictum in *Newman v. Piggie Park*, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968). Although in that case, a suit under Title II of the Civil Rights Act of 1964, there was a statutory authorization for an award of attorneys' fees, the Fifth Circuit found the logic equally applicable when no Congressional statement was present. The Court in *Newman* said:

"If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II.

"It follows that one who succeeds in obtaining an injunction under that Title should ordinarily recover an attorneys' fees unless special circumstances would render such an award unjust."

See also, Note, "Allowance of Attorney Fees in Civil Rights Litigation Where the Action is not Based on a Statute Providing For an Award of Attorney Fees", 41 Cin.L. Rev. 405 (1972).

The purpose of this [title] is to establish a uniform policy for the fair and equitable treatment of persons displaced as a result of Federal and federally assisted programs in order that such persons shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole.

b) The number of people who have benefited from plaintiffs' efforts—By their litigation efforts plaintiffs have conferred various benefits on numerous people in varying degree. The most immediate impact, of course, is on those 5000 people about to be uprooted from their homes and deprived of the parks that would be "replaced" by Route 238. Obviously, these people have benefited significantly from plaintiffs' efforts. The 200,000 residents of Hayward, Union City, and Fremont have also derived substantial benefits, for they can be assured that the last remaining parks in southern Alameda County will not be destroyed until formal fact-findings and policy determinations have been made.

In addition, the housing and environmental problems from the construction of this highway would have had a very real impact on all the citizens of the Bay Area. The glut on an already crowded housing market, the environmental damage to parks used by Bay Area residents, the increased crowdedness of recreational facilities would all have a substantial effect on residents of the Bay Area.

Moreover, all Californians benefit from this litigation:

1) Because of the decision, the California Highway Department is now most unlikely to build federal-aid highways that might damage the environment and remove people from their houses until the plans for the highway conform with federal statutes and regulations, in other words "state therapeutics"; 2) Californians can be assured that no people in *their* state will suddenly be homeless, and no parks areas will be destroyed, without some attempt to conform to strict standard; 3) California citizens are assured that any environmental damage to their state resulting from the construction of this highway will be minimized; 4) The distribution of people who use recreational facilities will be more even, and the housing market will not be glutted by the 5000 people suddenly found homeless because of this highway.

Finally, it should be pointed out that environmental protection, housing relocation, and highway construction are nearly everyone's business, and that almost all of society is better off when public policies in these areas have been strengthened.⁸

The fact that so many people have benefited in one way or another from this litigation—residents of Hayward, Union City, and Fremont, residents of the Bay Area, residents of California, the general public—is an additional factor favoring the awarding of fees.

c) The necessity, and financial burden, of private enforcement—Because of the limited resources and potentially conflicting interests within and among governmental entities, effectuation of the public policies towards environmental protection and housing relocation frequently depend on private vigilance and enforcement. In his August, 1971 "Message to Congress" President Nixon stated:

In the final analysis, the foundation on which environment progress rests in our society is a responsible and informed citizenry. My confidence that our Nation will meet its environmental problems in the years ahead is based in large measure on my faith in the continued vigilance of American public opinion and in the continued vitality of citizen efforts to protect and improve the environment.

See also *Powelton Civic Home Owners Association v. HUD*, 284 F.Supp. 809, 829 (E.D.Pa.1968).

Indeed, this point underlies much of the liberal trend in the "standing" requirements.⁹ Responsible representatives of the public should be encouraged to sue, particularly where governmental entities are involved as defendants. As the amicus brief points out, only private citizens can be expected to "guard the guardians."

⁸ This point, obviously, is related to the discussion of the effectuation of strong public policies above. Whenever a strong public policy has been effectuated by definition numerous people receive *some* degree of benefit.

⁹ See *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608 (2d Cir. 1965), cert. denied, *Consolidated Edison Co. of N. Y., Inc. v. Scenic Hudson Preserv. Conf.*, 384 U.S. 941, 86 S.Ct. 1462, 16 LEd.2d 540; *Office of Communication of United Church of Christ v. FCC*, 123 U.S.App.D.C. 328, 359 F.2d 994 (1966); *Road Review League, Town of Bedford v. Boyd*, 270 F.Supp. 650 S.D.N.Y.1967).

However, these exhortations towards citizen participation can sound somewhat hollow against the background of the economic realities of vigorous litigation. In many "public interest" cases only injunctive relief is sought, and the average attorney or litigant must hesitate, if not shudder, at the thought of "taking on" an entity such as the California Department of Highways, with no prospect of financial compensation for the efforts and expenses rendered. The expense of litigation in such a case poses a formidable, if not insurmountable, obstacle.¹⁰

The only public entities that might have brought suit in this case were named as defendants in this action and vigorously opposed plaintiffs' contentions. Only a private party could have been expected to bring this litigation, and yet a private party is least able to bear the tremendous economic burdens. To force the private litigants to bear their own costs here would be tantamount to a penalty, and it seems somewhat inequitable to punish litigants who have policed those charged with implementing and following Congressional mandates. Hence, the fact that only a private party could be reasonably expected to bring this action is one additional factor supporting the awarding of attorneys' fees in this case.

[8-10] Given, then, the presence of the three factors mentioned above—1) the effectuation of strong public policies; 2) the fact that numerous people received benefits from plaintiffs' litigation success; 3) the fact that only a private party could have been expected to bring this action—this Court believes that it must exercise its equitable powers and award attorneys' fees to the plaintiffs. While we conclude as did the Fifth Circuit in *Lee*, 444 F.2d 147, that this is a sufficient basis upon which to award attorneys' fees, the instant case presents a more appealing case for the exercise of this Court's equitable power to award fees. Unlike *Lee*, defendants in this motion are not private parties. Since the money will come from the state treasury the awarding of fees in the instant case will also serve the other objective of the *Mills* decision—matching, to the extent that the Court's jurisdiction over the matter makes possible, the costs and the benefits of litigation.¹¹

¹⁰ Absent foundation funding, it is simply not economically rational for any single individual or small group of individuals, to attempt to capture their minute portion of aggregate good by incurring large expense to enforce a widely held right. See M. Olson, Jr., "The Logic of Collective Action, Public Goods and The Theory of Groups" (Harv. Econ. Series #124, 1965).

¹¹ We stop here to consider the question, *sua sponte*, that this Court is without jurisdiction to grant attorney's fees or costs when the real party in interest is the State of California. It is not doubted that this Court has jurisdiction over this action in the main. *La Raza Unida v. Volpe*, D.C., 337 F.Supp. 221 (1971). It has been suggested however, that a federal court is without judicial power to award even court costs against state defendant without statutory authorization because of notions of sovereign immunity. *Sincock v. Obara*, 320 F.Supp. 1098 (D.Del.1970). Drawing a distinction between actions for injunctions, *see e.g.*, *Georgia R. R. & Banking Co. v. Redwine*, 342 U.S. 299, 72 S.Ct. 321, 96 L.Ed. 335 (1952), and an action which results in a monetary judgment against the state or any official in his representative capacity, the Court in *Sincock* declined to exercise its equitable powers to award either costs or attorneys' fees, for want of jurisdiction.

Other courts seem to hold that the power to tax costs against the state is necessarily incident to jurisdiction; that where jurisdiction over the action in the main is proper no specific statute is required to overcome the state's sovereign immunity in federal court. *See State of Utah v. United States*, 304 F.2d 23 (10th Cir. 1962); *cf. Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70, 48 S.Ct. 97, 72 L.Ed. 168 (1927).

In *Sims v. Amos*, the court said:

Individuals who, as officers of a state, are clothed with some duty with regard to a law of the state which contravenes the Constitution of the United States, may be restrained by injunction, and in such case the state has no power to impart to its officers any immunity from such injunction or from its consequences, including the court costs incident thereto.

340 F.Supp. 691 (M.D.Ala. decided March 17, 1972) (at n. 8) (emphasis added).

That federal courts have awarded attorney's fees to successful litigants against state officers cannot be denied. *See, e.g.*, *Sims v. Amos*, *supra*, (Governor of Alabama and Secretary of State); *Wyatt v. Stickney*, 344 F.Supp. 373 (M.D.Ala. decided April 13, 1972), (State regulatory agency). *See also, Cooper v. Allen*, *supra* (Mayor of Atlanta, Georgia); *Brewer v. School Board of Norwalk*, *supra* (school board); *Hammond v. Housing Authority & Urban Renewal Agency of Lane County*, 328 F.Supp. 586 (D.Or.1971), (municipal housing authority). But of course, the eleventh amendment has been read not to apply to local bodies. *Lincoln County v. Luning*, 133 U.S. 529, 10 S.Ct. 363, 33 L.Ed. 766 (1890).

Since we conclude as the court did in *Sims* that the state may no more immunize an individual from costs incident to an injunction than it may insulate him from the injunction itself, we find that sovereign immunity does not bar an award of attorney's fees against Chief Engineer Legarra. The State of California has provided that monetary claims or judgments against state officers, in such a situation, are reimbursable by the public entity which employed the individual. West's Cal.Code Gov't § 825 et seq. As such the questions of sovereign immunity with respect to the other defendants have become largely academic.

[11] The defendants argue that Congress, by its failure to provide for the awarding of fees in the statutes involved in this case, indicated an intent that fees should not be awarded. Congressional silence, however, is not a bar to the awarding of fees. See the discussion in *Mills*, 396 U.S. at 390, 90 S.Ct. 616. The Court possesses within its equity jurisdiction the power to award fees. See, *e.g.*, *Mills*; *Sprague*, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184 (1939). And the equities of this particular case compel the awarding of attorneys' fees. Plaintiffs' motion is granted.

We cannot emphasize enough that in granting this motion, the purpose is not to saddle the losing party with the financial burden in order to punish him, rather we shift the financial burden in order to effectuate a strong Congressional policy. *Accord*, *Mills*, 396 U.S. at 396-397, 90 S.Ct. 616.

[12] Plaintiffs also seek reimbursement for their expert witness fees. The affidavits of the expert witnesses were quite helpful to the Court, and were a crucial part of the plaintiffs' presentation. For the reasons stated above in granting attorneys' fees, plaintiffs' motion to award expert witness fees is also granted.

[Filed Aug. 10, 1973, Charles J. Ulfers, Clerk, U.S. District Court, Northern District of California]

In the United States District Court

Northern District of California

No. C-71-912 RFP

THE STANFORD DAILY, ET AL., PLAINTIFFS

v.

JAMES ZURCHER, INDIVIDUALLY AND AS CHIEF OF POLICE OF PALO ALTO, COUNTY OF SANTA CLARA, STATE OF CALIFORNIA, ET AL., DEFENDANTS

Memorandum and Order

This lawsuit had its genesis when several members of the Palo Alto Police Department, acting pursuant to a warrant, engaged in a search of the offices of the *Stanford Daily*, Stanford University's campus newspaper. Defendants are members of the Palo Alto Police Department, the District Attorney for Santa Clara County, and one of his deputies, each named individually and in his official capacity. The plaintiff is the Stanford Daily, an unincorporated association,¹ and its student editors.

Defendants, throughout this litigation, have maintained that the search of the *Daily* office, although no one at the *Daily* was suspected of committing a crime, was an entirely legal act, and they further maintain that they would conduct such a search again under similar circumstances.

I

Pursuant to 42 U.S.C. § 1983 (1970) plaintiffs brought suit in this court seeking declaratory relief and an injunction. On October 5, 1972, this court ruled, as to those not suspected of a crime, third parties, that the warrant was insufficient to comply with the fourth amendment when it appears that there was available to law enforcement personnel an alternative course of conduct which could achieve the same end in a manner much less intrusive upon the concerns voiced in the fourth amendment.² In other words, the court ruled that the law enforcement personnel must explore the *subpoena duces tecum* alternative before obtaining and executing a warrant for the search of those not suspected of criminal activity.³ During the pendency of the litigation, this court was surprised at the dearth of litigation on the question of the fourth amendment rights of third parties. *Id.* at 127. One possible explanation was that investigative agencies normally use the subpoena alternative to achieve their objective in examining materials of third parties.

Another possible explanation is that a defense to an action for monetary damages under 42 U.S.C. § 1983 brought against a law enforcement officer is that the officer acted in good faith. *Picerson v. Ray*, 386 U.S. 547 (1967).⁴ If a party chooses to vindicate his fourth amendment rights which have allegedly been violated by a law enforcement officer, albeit in good faith, he is relegated to declaratory and injunctive relief.⁵ The aggrieved person must be prepared to make the kind of showing which would warrant equitable relief. And lastly, for no pecuniary gain, he is required to engage in extensive litigation at considerable cost including attorney's fees, just for the satisfaction of having a court determine that the police violated the Consti-

¹ See Fed. Rule Civ. Pro., Rule 17(b) ; Cal. Code Civ. Pro. § 388(a) (West 1973).

² Memorandum and Order reported 353 F.Supp. 124 (N.D. Cal. 1972) ; Note, 86 HARV. L. REV. 1317.

³ The court granted declaratory relief only but left open the possibility that an injunction might issue if plaintiffs presented to the court facts which would indicate that declaratory relief alone was not sufficient to protect plaintiffs' rights as declared.

⁴ See text accompanying note 19, *infra*.

⁵ Cf. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 408 (1971). See also *Jackson v. Ogilvie*, 426 F.2d 1333 (7th Cir.), *cert. denied* 400 U.S. 833 (1970).

tution, and possibly obtaining an injunction if he can show that there is a real possibility the violation may reoccur.⁶

It is not surprising that when faced with the costs of interminable litigation against a city and county with relatively unlimited resources measured against the limited satisfaction obtained when and if relief is finally given, many potential plaintiffs are unwilling to take on the task of "fighting City Hall." At a time when legal costs, particularly attorney's fees are rising, third party rights protected by the fourth amendment, while existing in theory, in practice have no meaningful effect.

This situation may be contrasted to a criminal defendant, who has a relatively adequate remedy by way of a suppression hearing to determine the legality of the search. See *Mapp v. Ohio*, 367 U.S. 643 (1961); *Elkins v. United States*, 364 U.S. 206 (1960). The criminal defendant, unlike the third party, has an extraordinary incentive to vindicate his fourth amendment right to obviate a successful prosecution against him. And if he cannot afford counsel, one will be appointed for him.

The rights expressed in the fourth amendment are in constant tension with expedient law enforcement. *Almeida-Sanchez v. United States*, 41 U.S.L.W. 4970 (June 21, 1973). But it is the job of every citizen to insure that overzealous law enforcement personnel do not compromise the high value placed on privacy in our society. It is important to remember that the fourth amendment protects all the people, and not just those suspected of a crime. It would be a cruel irony if those people who harbored contraband had an adequate incentive to pursue an effective remedy for violations of their fourth amendment rights, while those who engage in entirely legal activity, because of the economic realities of the cost of attorney's fees must allow their constitutional rights to go unvindicated.

The plaintiffs have moved for an award of reasonable attorney's fees. For the reasons which follow, the motion is granted.

II.

It has been the general view in this country, absent statutory direction, that attorney's fees are not ordinarily awardable as a cost of litigation.⁷ In England, the courts have discretion to award a reasonable allowance for attorney's fees since the court was to make the prevailing party whole.⁸

The English rule which awards attorney's fees as costs to the plaintiff or defendant, whoever prevails, also has the effect of promoting settlement. The generally accepted American view is that recourse to litigation is not wrong, and that the party who does not prevail ought not to be penalized for his resort to the courts to vindicate his rights.⁹ It is indeed ironic that the very purpose of the general American rule, not to deter litigation, is in many cases having the exact opposite effect. The inability to get attorney's fees directly, or indirectly, through damage awards, has the effect of a deterring many potential plaintiffs from seeking redress in the courts. See *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1969) (per curiam).¹⁰ While legal aid offices¹¹ and contingent fee arrangement, where damages would lie,¹² have

⁶ See Note, *The Federal Injunction as a Remedy for Unconstitutional Policy Conduct*, 78 Yale L.J. 143 (1968).

⁷ The American rule was originally adopted when counsel fees were awarded by courts as a fixed sum of money, pursuant to a schedule. In a period of rising prices the attorneys successfully abolished court fixed fees. Goodhart, *Costs*, 38 YALE L. J. 849, 854 (1929); Note, 77 HARV. L. REV. 1135 (1964); Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792 (1966).

⁸ 6 J. Moore, *Federal Practice* 1703.

⁹ Note, 77 HARV. L. REV. 1135 (1964). Nor are attorney's fees directly awardable as damages. *Day v. Woodworth*, 13 How. 363 (1851); 6 J. Moore, *Federal Practice* 1704.

¹⁰ The Court in *Piggie Park* intimated no view, nor is the legislative history clear as to whether a party who successfully defends an action under Title II of the Civil Rights Act of 1964, § 204(a), 42 U.S.C. § 2000a-3 would be a prevailing party. Nor whether if a prevailing party, different factors might guide a court's discretion. See *Northcross v. Memphis Bd. of Ed.*, 41 U.S.L.W. 3635 (June 4, 1973).

¹¹ There approximately 355,000 attorneys licensed to practice in the United States, and only 2,500 work for legal services. Prepaid Legal Services, transcript of proceedings of a national conference held by ABA Special Committee on Prepaid Legal Services held in Washington, D.C., April 27-29, 1972 at 1. See also Brief of National Legal Aid and Defenders Association, *Amicus Curie* in *La Raza v. Volpe*, 73-1145 (9th Cir., appeal filed Dec. —, 1972).

A former Director of the Office of Economic Opportunity estimates that legal services meet only about 28% of poor people's needs. Testimony of Frank Carlucci, hearings on H.R. 40, H.R. 185, H.R. 357, etc. before the House Committee on Education and Labor, 92 Cong., 1st Sess. pt. e at 1866-67 (1971).

See J. Falk and S. Polack, *Political Interference with Publicly Funded Lawyer: The CRLA Controversy and the Future of Legal Services*, 24 HAST. L. REV. 599 (1973).

¹² The principals which underlie the contingent fee arrangement may have some bearing in determining what amount constitutes a reasonable attorney's fee where Congress or the courts provide for such an award. See Disciplinary Rule 2-106 of the Code of Professional Responsibility of the American Bar Association.

provided some legal services for those who could not otherwise afford them, there is no doubt that new methods of financing legal services to all levels of society must be explored.¹³ Accordingly many commentators have questioned the continuing vitality of the American rule, and its effect on the delivery of legal services. Many have suggested a liberalization of the strict American rule.¹⁴

III.

To ameliorate the inequities, both Congress and the courts have made inroads into the strict application of the American rule. It is now beyond dispute that federal courts have equitable powers to award attorney's fees in appropriate cases. *Sprague v. Ticonic National Bank*, 307 U.S. 161, 166 (1939). It is also well established that ". . . in the absence of statutory or contractual authorization, federal courts, in the exercise of their equitable powers, may award attorney's fees when the interest of justice so requires. *Hall v. Cole*, 41 U.S.L.W. 4658, 59 (May 21, 1973); *Mills v. Electric Auto-lite*, 396 U.S. 375 (1970).

The only question for a district court is then, whether in the exercise of its equitable powers, the interest of justice requires that fees be shifted. There are two parts to this question. First, is this the type of case in which the court has discretion to award attorney's fees as costs? And if so as a matter of the court's discretion, is this an appropriate case?

A. Type of case.

In *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939) the Court held that attorney's fees can be awarded when the judgment results in a "common fund" for the plaintiffs or for the class. In *Mills v. Electric Auto-lite*, 396 U.S. 375 (1970), the Court approved the award of attorney's fees to shareholders who succeeded in setting aside a corporate merger. The Court extended the scope of the common fund rationale by holding that no pecuniary benefit need be demonstrated. *Id.* at 393. As this court pointed out in *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972), *Mills* represents both the defensive and affirmative use of the Court's equitable powers. Defensive, to prevent unjust enrichment of free riders and affirmative or offensive to promote the effective implementation of the Congressional objective of fair and informed corporate suffrage, *Id.* at 98.

In *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968), in interpreting the scope of the reasonable attorney's fee provision under Title II of the Civil Rights Act of 1964, 204(b), 42 U.S.C. § 2000 a-3(b), the Court found that fees were awardable as costs "not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II." In essence, the Court found, in determining Congress's objective, that the general American Rule, not to award attorney's fees as costs, was having the opposite effect from its intent. Far from promoting a judicial determination of rights, at least in the equitable relief area, the policy of not awarding fees was an obstacle to a judicial determination of rights.

Mills and *Piggie Park* touched responsive chords, and the federal judiciary responded in a myriad of decisions indicating that where a plaintiff seeks only equitable relief, that strict application of the American rule no longer makes sense as a policy to promote access to courts. *Hall v. Cole*, 41 U.S.L.W. 4658 (May 21, 1973); *Northercross v. Memphis Board of Ed.*, 41 U.S.L.W. 3635 (June 4, 1973); *Sims v. Amos*, 409 U.S. 936 aff'g. 340 F. Supp. 691 (M.D. Ala. 1972); *Knight v. Auciello*, 453 F.2d 852 (1st Cir. 1973); *McEnteggart v. Catuldo*, 451 F.2d 1109 (1st Cir. 1971); *Gartner v. Soloner*, 384 F.2d 348 (3rd Cir. 1967); *Brewer v. School Bd.*, 456 F.2d 943 (4th Cir. 1972), *cert. denied*, 92 S.Ct. 1778; *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir.

¹³ See McLaughlen, *The Recovery of Attorney's Fees: A New Method of Financing Legal Services*, 40 Ford. L. Rev. 761 (1972); See Sen. Rep. 93-146 accompanying S. Res. 101, 93rd Cong., 1st Sess. (1973) authorizing a new subcommittee of the Senate Judiciary Committee to inquire into, inter alia, new methods of financing the delivery of legal services.

¹⁴ Ehrenzweig, *supra.*, Stoebe, *Counsel Fees Included in Costs: A Logical Development*, 38 U. COLO. L. REV. 202 (1966) McLaughlen, *supra.*, Kuenzel, *The Attorney's Fee: Why not a Cost of Litigation?* 49, IOWA L. REV. 75 (1963) Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?* 20 VAN. L. REV. 1216 (1967); Note, *The Allocation of Attorney's Fees After Mills v. Electric Auto Lite Co.*, 38 U. CHI. L. REV. 316 (1971).

1971); *Callahan v. Wallace*, 466 F.2d 59 (5th Cir. 1972); *Cooper v. Allen*, 467 F.2d 836 (5th Cir. 1972); *Donahue v. Staunton*, 471 F.2d 475, 482 (7th Cir. 1972); *Yablonski v. United Mine Workers*, 466 F.2d 424 (D.C. Cir. 1972), cert. denied, 40 L.W. 3512 (1973); *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972); *Johnson v. San Francisco Unified School District*, Civ. No. 70-1331 SAW (N.D. Cal. decided Sept. 12, 1972).

Ross v. Goshi, 351 F. Supp. 494 (D. Haw. 1972); *Jinks v. Mays*, 350 F. Supp. 1037 (N.D. Ga. 1972); *Newman v. Alabama*, 349 F. Supp. 278 (M.D. Ala. 1972); *Wyatt v. Stickney*, 344 F. Supp. 408 (M.D. Ala. 1972); *NAACP v. Allen*, 340 F. Supp. 703 (M.D. Ala. 1972); *Shull v. Columbus Mun. Separate School Dist.* 338 F. Supp. 1376 (N.D. Miss. 1972); *Local 4076 United Steelworkers v. United Steelworkers*, 338 F. Supp. 1154 (W.D. Pa. 1972); *Moore v. Knowles*, 333 F. Supp. 53 (N.D. Tex. 1971); *Brown v. Ballas*, 331 F. Supp. 1033 (N.D. Tex. 1971); *Hammond v. Housing Authority and Urban Renewal Agency of Lane County*, 328 F. Supp. 587 (D. Ore. 1971); *Lyle v. Teresi*, 327 F. Supp. 683 (D. Minn. 1971).

While various rationales have been given for including attorney's fees as costs, the courts are in essence making a judgment that including attorney's fees as costs is an additional remedy necessary to effectuate the congressional underpinnings of a substantial program.

The equitable federal powers to imply remedies is not new. Act of May 8, 1792, § 2, 1 Stat. 276; C. Wright, *Law of Federal Courts*, 257 (2d ed. 1970.)¹⁵ As Justice Harlan wrote, concurring in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971):

"Thus, in suits for damages based on violations of federal statutes lacking any express authorization of a damage remedy, this Court has authorized such relief where, in its views, damages are necessary to effectuate the congressional policy underpinning the substantive provisions of the statute." *J. I. Case v. Borak*, 377 U.S. 426 (1964); *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210, (1944). *Id.* at 402.

The Court in *Bivens* held that in order to protect encroachment by federal officers on rights protected by the fourth amendment, it was necessary to imply a particular remedial mechanism, that is, suits for damages.

In *J. I. Case v. Borak*, *supra*, the Court "'implied"—from what can only be characterized as an 'exclusively procedural provision' affording access to a federal forum * * * a private cause of action for damages for violation of § 14(a) of the Securities Exchange Act of 1934, 48 Stat. 895, 15 U.S.C. § 78n (a)." *Bivens*, 403 U.S. at 403 n.4. In *Mills*, the Court found that the policies expressed by Congress in the same statute also required that an award of attorney's fees be made because this would "provide an important means of enforcement of the proxy statute." 396 U.S. at 396.

In *Bivens*, after recognizing the inherent equitable power to imply remedies, the late Justice Harlan passed to the question of whether a damage remedy would be appropriate. In reaching the conclusion that implying a damage action is appropriate in the fourth amendment area, he relied on the fact that no other alternative remedy was provided to insure the vindication of the right in question, and that the right ranked sufficiently high on the social scale that it was worthy of protection.¹⁶

In *Bivens*, Harlan concluded that the fourth amendment area was peculiarly suited for judicial supervision and remedy formulation. *Id.* at 405-410. See *Mapp v. Ohio*, *supra*. See also *Bell v. Hood*, *supra*. To the plaintiffs in *Bivens* the exclusionary rule was irrelevant and injunctive relief was unlikely. Additionally he found that the rights protected by the fourth amendment ranked at least as high on our social value as the rights of stockholders defrauded by misleading proxies. *Bivens*, 403 U.S. at 411. See *J. I. Case v. Borak*, *supra*, giving private damage remedy, and *Mills*, *supra*, awarding attorney's fees as costs thereby insuring that the right of action given in *J. I. Case Co.*, will in fact be brought.

¹⁵ *Bell v. Hood*, 327 U.S. 678 (1946); *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964); *Deckert v. Independence Corp.*, 311 U.S. 282 (1940); *Mitchell v. De Mario Jewelry*, 361 U.S. 288 (1960); *Swann v. Board of Ed.*, 402 U.S. 1 (1971).

¹⁶ Congress has by statute recognized that certain classes of rights rank high on the nation's social priorities and have given to plaintiffs the additional remedy of fee shifting. See e.g., 42 U.S.C. § 2000a-3(b) (public accommodations); 42 U.S.C. § 2000(e)-5(k) (equal employment); 42 U.S.C. § 3612(c) (fair housing). See also Education Amendments of 1972 § 718, 41 U.S.L.W. 45 (June 23, 1972). Compare Opinion of the Court in *Hall v. Cole*, *supra*, with dissent of White, J. arguing that internal labor disputes were not of sufficient public concern to imply an attorney's fee award.

Applying the criteria for the appropriate use of the court's equitable power to imply remedies to the instant motion, it would seem fee shifting is appropriate. First, there is in the fourth amendment no detailed pattern of remedies such that one could fairly draw the inference that the remedies provided were complete. See *Fleishman Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967). See also *Bivens*, *supra*. The absence of a "meticulously detailed" pattern of remedies has been one signal that attorney's fees may be awarded as costs. *Mills*, 396 U.S. at 391. *Accord Hall v. Cole*, *supra*; *Lee v. Southern Homes*, 444 F.2d at 145; *La Raza Unida v. Volpe*, 57 F.R.D. at 99.

Like *La Raza*, no remedial action can be expected from public officials, as they are named as defendants in the action. Moreover, in *J. I. Case Co.*, *supra*, and *Mills*, *supra*, the Court was not content to rely solely on public enforcement by the Securities Exchange Commission for the important rights proclaimed in the statute.

Additionally, 42 U.S.C. § 1983 and its jurisdictional concomitant, 28 U.S.C. § 1343(3) represents congressional indication that federal courts should use their equitable powers to insure vindication of the rights protected by the Constitution and laws from infringement by those acting under color of state law, by implying an award of attorney's fees as costs. *Jinks v. Mays*, 350 F. Supp. 1037 (N.D. Ga. 1972). See *Donahue v. Stanton*, 471 F.2d 475, 482 (7th Cir. 1972); *N.A.A.C.P. v. Allen*, 340 F.Supp. 703 (N.D. Ala. 1972). The *raison d'être* of 42 U.S.C. § 1983 is to encourage the vindication of constitutional rights, to promote litigation of the rights involved, and to give the courts leeway to fashion appropriate remedies. Cf. 42 U.S.C. § 1988.

As to placing a high social order on the rights in question, there can be no doubt as to the importance of the fourth amendment. The Court in *Almeida-Sanchez v. United States*, 41 U.S.L.W. 4970 (June 21, 1973) recently recalled the words of Justice Jackson on his return from the Nuremberg Trials:

"These [Fourth Amendment rights], I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among the deprivation of rights, none is so effective in cowering a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. *Brinegar v. United States*, 338 U.S. 160, 180 (Jackson, J., dissenting)."

Accordingly this court feels that in equitable suits to remedy violations of fourth amendment rights of those not suspected of criminal activity, an award of attorney's fees as costs is within the court's power and responsibility. Where as here fee shifting is necessary to insure the vindication of important constitutional rights¹⁷ and appropriate because of the inadequate remedies otherwise available, because it is consistent with a remedy increasingly furnished by Congress, and because of the high social value placed upon the rights involved, an award of attorney's fees as costs is essential, lest these important rights be relegated to a mere platitude.

B. Appropriateness of Fees in This Case.

Having determined that this is the type of case in which an award of attorney's fees as costs might be appropriate, the matter of the exercise of the court's discretion is not difficult.¹⁸ Even when no statute is involved, fees

¹⁷ It has been argued that the Daily is a clearly identifiable plaintiff, so that even absent fee shifting these types of plaintiffs, not representatives of a class, might have sufficient incentive to litigate the matter. First it must be noted that other courts have not required class action status as a prerequisite to fee shifting. See *Donahue v. Stanton*, 471 F.2d 475 (7th Cir. 1972). Nor is class action status a requirement under any of the statutory scheme provided by Congress. See note 16, *supra*. Second, the Daily was fortunate enough to have a law professor on the Stanford campus willing to bring the litigation. But this Court has already indicated its unwillingness to rest the vindication of important rights on the chance that some attorney, public interest law firm, or legal aid agency will be willing to represent the plaintiff without hope of remuneration. *La Raza*, 57 F.R.D. at 101. See also *Id.* at 98 n.6.

¹⁸ *Kelly v. Guinn*, 456 F.2d 100 (9th Cir. 1970).

should ordinarily be awarded as costs in the appropriate type of case, unless there is an affirmative, articulated reason for the denial. *Cooper v. Allen*, 467 F.2d 836 (5th Cir. 1972). See *Northcross v. Memphis Bd. of Ed.*, *supra*. (statutory authorization).

Here counsel for plaintiff effectively represented his client and aided the court in an area scant with precedent to guide its decision. Accordingly this court finds that, this is the type of case in which the court has discretion to award the fees as costs, and this is an appropriate case for the exercise of that discretion.

IV.

Lastly, the defendants argue that they may assert as defense to the assessment of attorney's fees as costs, the legal defense to an action for monetary damages that the law enforcement acted in good faith and upon probable cause.¹⁹ *Pierson v. Ray*, 386 U.S. 547 (1967); *Anderson v. Reynolds*, 342 F. Supp. 101 (D. Utah 1972) (policeman); *Ney v. State of California*, 439 F.2d 1285, 1287 (9th Cir. 1971); *Dodd v. Spokane County, Washington*, 393 F.2d 330 (9th Cir. 1968) (District Attorney in his investigative function).

Where an award of attorney's fees is made as an element of the costs of equitable litigation incident to the vindication, of otherwise unremediable constitutional rights, the fact that a prior action was taken in good faith would not seem relevant. An award for attorney fees and an award for damages have historically been separated. See *Day v. Woodworth*, 13 How. 363 (1851); 6 J. Moore, *FEDERAL PRACTICE* 1704. Unlike damages an award of attorney's fees is not imposed in any way to penalize, stigmatize, or punish the defendants for wrongdoing. As this court said in *La Raza*, *supra*:

"We cannot emphasize enough that in granting this motion, the purpose is not to saddle the losing party with the financial burden in order to punish him, rather we shift the financial burden in order to effectuate a strong Congressional policy. *Accord Mills*, 396 U.S. at 396-97. *Id.* at 102."

Moreover an award of attorney's fees as cost, at least in California, will not have the undesirable effect of hampering zealous law enforcement which so concerned the Court in *Pierson*, *supra*. For it is the law in this state that there is a mandatory duty of the City Attorney, or the County Counsel to defend the policemen or the district attorney. Any judgment against the public official shall be paid by the public entity which employed the individual, provided that he was acting within the scope of his employment at the time. Cal. Gov't. Code § 825, *et seq.* As such the action may proceed without any personal involvement on the part of the individual. As the court said in *Sinclair v. Arnebergh*, 224 Cal. App. 2d 595 (1964):

With such protection afforded the public can expect that its laws will be zealously enforced without any hesitation occasioned by consideration of possible personal involvement in defending resulting litigation. *Id.* at 597-98."

See also 42 U.S.C. § 1988; *Hesslgesser v. Reilly*, 440 F.2d 901 (9th Cir. 1971) cited with approval in *Moor v. County of Alameda*, 41 U.S.L.W. 4627 (May 14, 1973).

Accordingly this court finds that the legal defense of good faith enforcement of the law, found not to be abrogated by 42 U.S.C. § 1983, as against an action seeking monetary damages, has no place here where equitable relief is sought to declare rights and enjoin further illegal action. This is especially so in California where the public, and not the individual officer, will bear the responsibility for litigation and pay any judgment for attorney's fees rendered against the law enforcement personnel. The motion for an award of reasonable attorney's fees as costs is granted.

Dated: August 10, 1973.

ROBERT F. PECKHAM,
United States District Judge.

¹⁹ See *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 456 F.2d 1339 (2d Cir. 1972). (on remand)

[Filed Aug. 29, 1973, James F. Davey, Clerk]

United States District Court
for the District of Columbia
Civil Action Nos. 2599-70, 2088-71

SLIMP KISER, ON BEHALF OF HIMSELF AND ALL OTHER SIMILARLY SITUATED
PLAINTIFFS, PLAINTIFF

v.

ARNOLD R. MILLER, ET AL., DEFENDANTS.

EDWIN WALLACE MOORE, PLAINTIFF, AND JAMES L. WALKER AND ESTILL SMITH,
INTERVENING PLAINTIFFS

v.

UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND OF 1950,
ET AL., DEFENDANTS

APPEARANCES

Daniel L. O'Connor, Esq., J. Michael Farrell, Esq., Attorneys for the Class
in Civil Action No. 2599-70.

Julian H. Singman, Esq., Attorney for Intervenor-Plaintiffs in Civil Action
No. 2599-70.

Louis Rabil, Esq., Attorney for Plaintiff and Intervenor-Plaintiffs in Civil
Action No. 2088-71.

Harold H. Bacon, Esq., Joseph A. Rafferty, Jr., Esq., Attorneys for De-
fendants.

Joseph A. Yablonski, Esq., Lewis D. Sargentich, Esq., Clarice R. Feldman,
Esq., Daniel B. Edelman, Esq., Attorneys for the *Amicus Curiae*, the United
Mine Workers of America.

Memorandum Opinion of United States District Judge Charles R. Richey

This case is before this Court on remand from the Court of Appeals for
the District of Columbia, to determine the question of appropriate counsel
fees to be awarded to the attorneys for the *Kiser* class and the attorneys for
the two groups of intervenors, the *Adkins* group and the *Moore* group.

The matter of counsel fees is a subject of great controversy, with the eye
of storm fixed on the standards by which the fee is regulated and set. No
standard can be applied in a vacuum. Therefore, before turning to the merits
of the award, the Court believes it will be helpful to establish a framework
of facts and events which produced the posture of this case.

I. HISTORY OF LITIGATION

This case commenced as a personal suit by Slimp Kiser, a Kentucky coal
miner, against the former Trustees of the United Mine Workers of America
Welfare and Retirement Fund of 1950. The original complaint was later
amended to include all miners who had retired after February 1, 1965 and
who had been denied pension benefits because they did not meet the last
signatory employment requirement which the defendant trustees enacted in
Resolution No. 63 on January 4, 1965. The Court determined that a valid
class existed by Order entered August 6, 1971 which was later amended on
January 4, 1972. The *Kiser* suit was consolidated with the suit of Edwin
Moore, James Walker, and Estill Smith versus the defendant Fund (C.A.
2088-71). And subsequently Messrs. Milford Adkins, James Hensley and
Albert Madden were granted leave to intervene in the consolidated action.

The suit sought to compel the Defendants to pay the Plaintiffs their pen-
sions. The Defendants had denied the Plaintiffs' pension applications on the
ground that they had not worked in the coal industry as an employee of an
operator signatory to the National Bituminous Coal Wage Agreement of 1950
for at least one full year immediately prior to permanent retirement. In
a Memorandum Opinion of January 19, 1973 this Court held that the last
signatory employment requirement was invalid as a basis upon which to

deny the Plaintiffs their pensions. See, Memorandum Opinion of January 19, 1973, 353 F. Supp. 736, *et seq.*, for a complete discussion of the issues and the Court's decision.

The Defendant trustees moved for reconsideration of this Court's January 19 decision. Upon reconsideration, the Court entered a Supplemental Opinion and Order on February 6, 1973 which reaffirmed the Court's decision with respect to the invalidity of the last signatory employment requirement. However, the Court did amend its original order by deleting the requirement that the trustees pay interest at 6% per annum on the total amount of the accrued pension, and further provided that the payment of accrued pensions should be from the first day of the month following the date of denial rather than from the actual date of denial.

The Defendants appealed. On July 23, 1973 the United States Court of Appeals for the District of Columbia Circuit entered an order authorizing this Court to rule on Plaintiff-Appellees' request for counsel fees and further directed that "* * * (2) the appellant Fund is directed forthwith to pay to those members of the plaintiff class who have been entered upon the pension rolls of the Fund as a result of this Court's Order of May 24, 1973 an amount equal to two-thirds of the total amount due said pensions; (3) the appellant Fund is directed to place the remaining one-third of the amount due members of the plaintiff class who have been placed on the pension rolls into an interest bearing account with a recognized banking institution in the District of Columbia until further order of this court or final disposition of this appeal on the merits; * * *"

In view of the foregoing, the Court undertook an in-depth consideration of the matter of appropriate attorney's fees. All counsel presented requests that the defendant fund pay their attorney's fees. They each also presented various contingent fee agreements.

The *Moore* counsel requested \$23,000 in fees plus \$891.32 in costs and expenses from the Fund. They showed 130 hours spent on the case. In the alternative, they informed the Court that counsel fees would be provided by the contingent fee agreements between themselves and their three clients. Under the agreement Mr. Moore would pay 35% of his total recovery (\$8,400) and Messrs. Smith and Walker would pay 25% of their respective total recoveries (\$6,500 each).

Counsel for the *Adkins* group petitioned for \$14,485.83 in fees and \$97.26 in costs to be taxed to the Defendants. Alternatively, they requested that the Court honor their contingent fee agreements which sought a percentage of only the accrued (past) pension benefits rather than out of future benefits. The agreements provided for a flat fee of \$1,500 from each client out of their accrued pensions plus 33-1/3% of the accrued pension over \$1,500 from Mr. Adkins (\$2,400) and 50% of the accrued pension over \$1,500 from Messrs. Madden and Hensley. The *Adkins* group's attorney expended 286 hours on the case, according to their counsel's affidavit.

The *Kiser* attorneys also had a contingent fee agreement with the original Plaintiff, Mr. Kiser, for one-third of his accrued pension. As partial compensation for the 2,065 hours logged as class counsel, the *Kiser* attorneys seek 33-1/3% of each class miner's accrued pension to be deducted from the total recovery of accrued benefits plus 10% of each miner's future pension and benefits (\$1,600,000) to be paid by the Fund from general revenues over the next ten years. Counsel has informed the Court that 401 miners have signed a "fee agreement" consenting to this contingent fee formula.

The "consents" to *Kiser* attorneys fees has caused some confusion in the record. The consent forms were mailed to the members of the class on January 22, 1973, several days after the judgment was entered in this case and the Court informed counsel that it would determine the question of attorneys fees. The form was attached to a covering letter describing the successful judgment. In the last paragraphs of the three-page letter, counsel informed class members of the fee formula and urged the members to sign the agreement.

It is alleged that shortly after the original Opinion of the Court on January 19, counsel for all parties met with the Court in Chambers, and it is further alleged that the letter was discussed. The Court does not recall such discussion as to any contingent fees, etc. and neither do the attorneys for the Defendant Fund. The record discloses that one day after that meeting, the *Kiser* petitioners mailed the letter with the proposed fee agreement to the class members. When the fact of this letter came to the Court's attention,

the matter was promptly set down for a hearing on February 15, 1973; and while the transcript will speak for itself, *Kiser* petitioners did not dispute at any place therein the following:

(a) the Court did not countenance a contingent fee agreement of the kind contemplated by *Kiser's* attorneys in this particular case; and

(b) the Court wanted a new notice sent out to all members of the class; and

(c) counsel were directed to submit an order for a new notice to the Court for its approval with an opportunity on the part of the defendants to object.

Counsel for Defendant Trustees did not submit the Order requested, and none was entered. In any event, and in order to set the record straight, this Court at no time ever approached a contingent contract in the manner set forth in the aforementioned letter sent out by the *Kiser* attorneys to the class members.

II. THE CLASS ACTION STANDARD OF REASONABLE ATTORNEY'S FEES MUST CONSIDER TIME, EFFORT, SKILL, COMPLEXITY, RISK, RESULTS, INCENTIVE, AND PUBLIC SERVICE IN LIGHT OF THE ATTORNEY-CLASS RELATIONSHIP, AND NOT SOLELY A FLAT PERCENTAGE

The facts of this case exemplify the inherent controversy and problems attendant with the question of counsel fees in class actions. The fundamental concern has been that the attributes of the class action—speed and efficiency in the administration of justice—will be obliterated if certain factors are left uncontrolled. The potential for abuse lies in the area of unreasonable charges for attorney fees and improper solicitation of such fees from actual or potential class members. As a preventive measure for such abuses, it has been strongly recommended that the matter of attorney's fees be left to the determination of the Court using a standard applicable to the unique situation of a class action. § 1.41 "Preventing Potential Abuse of Class Action," *Manual for Complex Litigation, Federal Practice and Procedure*, Part I at 22-23 (1973).

The standard used to determine class action attorney's fees must meet the problem on two levels. On the first level, it must weigh the following factors: (1) time and effort expended; (2) the novelty and difficulty of the issue; (3) the skill required to perform the legal services properly; (4) the amount of duplication of other counsel's work; (5) the amount of risk involved; and (6) the nature and amount of the results obtained.¹

On the second level, the standard must include three considerations unique to the class action. They are: (1) *The Attorney-client Relationship*—The representation of the class is not the result of private enterprise but the result of judicial determination; (2) *Public Service Element*—an element of public service is involved in seeking and accepting employment as counsel for the class; and (3) *Incentive Factor*—the policy of the law in class actions is to provide a motive to private counsel to represent the public and enforce the law. See, § 1.47 "Control of Attorneys Fees and Expenses in Class Actions," *Manual for Complex Litigation, supra* at 49-51.

These class action standards in the preceding paragraph incorporate several of the factors used to judge the reasonableness of the fee charged for services to an individual client, but considers them in a different perspective. As the form, nature and substance of the relationship between the class members and class counsel are different from those which characterize the relationship between counsel and an individual party capable of contracting for the payment of attorney's fees, so also is the standard measuring the attorney's fees different.

The question of appropriate counsel fees has been tied to apron strings of the contingent fee percentage for too long. In saying this, the Court is not unmindful that contingent fees in many instances, as a practical matter, have a long tradition in the legal profession, and have served and will serve a useful public purpose. However, in class actions, under Rule 23, it is incumbent upon the bar and bench to apply their imagination to a solution for this pressing problem. As Judge Decker in *Illinois v. Harper & Row Publishers*, 55 F.R.D. 221 (N.D. Ill. 1972) has warned:

"* * * If Rule 23 is to be preserved against deserved criticism, some at-

¹ See also, Code of Professional Responsibility, § DR 2-106.

tempt must be made by the court to suit the award of fees to the performance of the individual counsel in light of the size of the settlement. Otherwise, the attorneys who are taking advantage of class actions to obtain lucrative fees will find themselves vulnerable to the criticism expressed in the Italian proverb, 'A lawsuit is a fruit tree planted in a lawyer's garden.'" at 224.

Thus, while a fee awarded in a class action suit might reflect a percentage of the total recovery, this selected percentage cannot be the primary determinate. After counsel has been adequately compensated, including a premium to provide a notice for class representation, no further incentive is needed. Therefore, though the amount recovered bears consideration, the primary focus should be upon the time and effort expended, the skill needed (papers which are merely repetitive work of others count for little), the risk involved, the nature of the benefits recovered and the effect of the award on the public interest and reputation of the courts. §1.47 *Manual on Complex Litigation*, supra, at 50. As the Manual goes on to state succinctly:

"In no event should representation of a judicially determined class be allowed on the same basis as in a contingent fee contract between competent contracting counsel and client." *Id.*, at 50.

To justify the contingent fee percentage in class actions on the grounds that the recovery is a "windfall" to the class, and, therefore, there should be a "windfall" award to the attorney is without logical merit. The initial premise is faulty, i.e., to say that the recovery, when prorated to its subsistence sum of \$1,800 per year, is windfall, is to disregard today's economic realities. Furthermore, the second premise implies a selfishness unbecoming to the legal profession. This thinking is all the more unacceptable when one remembers that the purpose of the suit was to restore the rights of a deprived class. In such circumstances, a sizable diversion of the recovery for attorney's fees would merely constitute a substitution of one fiduciary wrongdoer with another.

III. THE FOREGOING STANDARD MUST BE APPLIED TO THE INDIVIDUAL FACTS OF EACH CASE

There are certain facts in this case which are relevant to the application of the class action standard in this case. They are as follows:

(1) This case was decided on a question of law in a Motion for Summary Judgment; and

(2) The principle issue in the case was not novel, having been determined in a number of earlier suits;² and

(3) Nor was the issue involved complex. The defendants basically contested only the required period of signatory service at oral argument. The Petitioners filed a three-page memorandum of points and authorities citing only two key cases: *Roark II* and *DePaoli*, supra and

(4) Kiser counsel logged approximately 2,065 hours on the case since its inception in 1969 on behalf of the original plaintiff, Mr. Kiser. The diaries of counsel show little time was necessary for legal research. The papers filed are brief relying primarily on the logic of the facts in this case. In fact, nearly one-half of the bulk of the papers filed in this case pertain to the question of attorney's fees. In addition, no discovery or litigation was necessary in the case; and

(5) The total amount of recovery is still debatable as the actual number of miners in the class has not been resolved. *Kiser* counsel claim there are 666 members of the class and defendants claim 356 are validly enrolled as

² e.g., *Roark v. Lewis*, 130 U.S. App. D.C. 360, 401, F.2d 425 (1968) (*Roark I*); *Roark v. Boyle*, 141 U.S. App. D.C. 390, 439 F.2d 497 (1970) (*Roark II*); *DePaoli v. Boyle*, 144 U.S. App. D.C. 364, 447 F.2d 334 (1971); *Teston v. Carey*, — U.S. App. D.C. —, 464 F.2d 765 (1972); *Belcher v. Carey*, C.A. 71-1622 (decided January 28, 1972 D. C. Cir.); *Pete v. UMW Welfare and Retirement Fund of 1950*, C.A. 1963-69 and *Blankenship v. UMW Welfare and Retirement Fund of 1950*, C.A. 2186-69 and 2350-69 (settled January 1973).

The *Blankenship* case presents a noteworthy comparison to this case, though the questions and matters involved were more complex. The total recovery in *Blankenship* is estimated at \$300,000,000.00. The class size involved possibly 20,000 miners (this case involves only 300 to 600). To obtain the recovery 15 lawyers worked over 14,000 hours, taking 25 depositions, conducting two trials, and contesting many, not one, regulation. In determining the award of counsel fees, Judge Gesell divided the case into three phases. He awarded \$825,000 in fees for the first two phases and obtained an agreement that fees in the final phase would not exceed \$200,000.

of August 10, 1973. Thus 310 miners or their estates are still in dispute. Accordingly, minimum and maximum benefits to the Kiser class are as follows:

1 (a) Maximum retroactive benefits (666 miners)-----	\$2, 797, 200. 00
1 (b) Minimum retroactive benefits (356 miners)-----	1, 485, 200. 00
2 (a) Maximum prospective pensions-----	\$11, 812, 642. 00
2 (b) Minimum prospective pensions-----	6, 314, 372. 00
3 (a) Maximum welfare benefits-----	\$1, 301, 364. 00
3 (b) Minimum welfare benefits-----	695, 624. 00
<hr/>	
Total (666 miners maximum)-----	\$15, 911, 206. 00
Total (356 miners minimum)-----	4 8, 495, 193. 00

⁴ These figures are based on the table of estimated individual benefits set out at page 7 of the Kiser attorneys' Supplemental Memorandum in Support of Motion for Partial Allowance of Attorney Fees, filed August 6, 1973. We have set out the table below. Counsel determined the amount of total recovery based on 290 miners.

	Individual Benefit	Requested percent	Fee Amt.	Total recovery for 290 members (290 X indi- vidual benefits)
Retroactive pension benefit-----	4, 200	33 $\frac{1}{3}$	1, 400	\$1, 218, 000. 00
Benefits from Jan. 1-July 31, 1973-----	1, 050	10	105	304, 500. 00
Funding for future benefits-----	17, 737	10	1, 773	5, 143, 730. 00
Welfare benefits-----	1, 954	10	195	566, 660. 00
Total-----	24, 941	13. 9	3, 473	7, 232, 890. 00

Thus the total recovery for the *Kiser* class lies somewhere between these two figures; and

(6) The work remaining in the case consists of the argument in the Court of Appeals (briefs already filed) and the resolution of the minor dispute as to whether the 310 miners or their estates are valid members of the class. In this regard the United Mine Workers of America and the Defendant Trustees were ordered on August 1, 1973 to go into the field and assist these people in the preparation and filing of applications to determine whether they were valid members of this class and thus entitled to the benefits (Tr. 51-52). This directive eliminates the need for extended future services on the part of counsel.

IV. IN DETERMINING ATTORNEY FEES FOR THE CLASS THE COURT APPLIED THE CLASS ACTION STANDARD AND IS NOT BOUND BY THE CONTINGENT FEE AGREEMENTS WHICH ARE VOID AS AGAINST PUBLIC POLICY

In light of the Class Action Standard, the contingent fee agreement which the *Kiser* attorneys urge this Court to adopt would not be a true reflection of a reasonable fee in this suit. To determine an equitable award which includes an incentive for future class actions requires a delicate balance of all the factors set out above. The Court trusts that counsel will understand and accept that this is an unpleasant task for Courts, especially this one, for it has practiced law for so long in the vineyard before coming to the bench and recognizes the difficulties of maintaining a law office in these days of increasing costs and difficult issues.

This Court finds, on the facts presented in this case, that an hourly rate of \$40⁵ provides more than adequate compensation. The Court has taken the number of hours logged discounted them by 35% to compensate for the numerous telephone calls and conference among attorneys, the time spent on the attorney fee question, and the discrepancies among the lawyers as to

⁵ The hourly fee in *Blankenship* was \$45 per hour before taking into account the premium of \$200.00. It goes without saying that the issues involved in *Blankenship* were more complex and novel than those in *Kiser*, not to mention the fact that *Blankenship* involved pre-trial discovery, two trials, a recovery of \$300,000,000 for approximately 20,000 pensioners. See also the \$35 per hour fee in a suit against a union for breach of fiduciary duty, *Bakery & Confectionary Workers International v. Ratner*, 118 U.S. App. D.C. 269, 335 F.2d 691 at n. 3, 1968 (1964).

the time spent in court on hearings of various motions. The fee for the hourly compensation is \$53,680.00. As a premium, for the class representation, the Court has added an amount equal to 10% of the hourly computation,⁶ giving the total amount of \$59,048. For any future services, that might be rendered, the Court awards an additional \$3,000.⁷ Thus the total award equals \$62,048.

The Court has made its determination based on the following reasons:

(1) The issues were neither novel or complex. The case required no pre-trial discovery. Decisions in other suits allowed this case to be adjudicated on a Motion of Summary Judgment with a three-page memorandum of points and authorities citing only two cases. A large bulk of time and papers was spent on the attorney's fee question. Outside of the papers filed in the fee's question, neither the papers filed or the time logs show many hours on legal research; and

(2) There was relatively little risk involved in the case in light of the earlier decisions and the settlement of the *Blankenship* case; and

(3) The principal benefit that the members of this suit obtained that they would not have received as members of the *Blankenship* class was approximately \$2,400 more in retroactive benefits. Therefore, it is the \$2,400 times the number of members in the class which should be viewed as the actual recovery in the case; and

(4) As both attorneys recognized, this suit involves a significant element of public service. In fact, the *Kiser* counsel have stated that they undertook the suit in the spirit of humanitarianism; and

(5) The Court determined this to be a class action, thus the Court established counsel's relationship to the class; and

(6) The nature of the recovery was compensation for denied pension and welfare benefits. Private counsel should not benefit in the same manner as if this were a personal injury action or an action against a corporate giant involving an antitrust claim; and

(7) Members of the class are well-known to be the most underprivileged and impoverished group in the nation. The meager benefit of \$1,800 per year, for which they have literally given their lives, must have the Court's protection from large claims by attorneys; and

(8) This Court is not bound by the contingent fee consents that *Kiser* counsel has with 401 members of the class. Contracts made by persons in a fiduciary relationship with the other party are always subject to close judicial scrutiny and are treated as presumptively voidable. E.g., *Spikler v. Hankin*, 88 U.S. App. D.C. 206, 188 F.2d 35 (1951); *Udall v. Littell*, 125 U.S. App. D.C. 89, 97, 366 F.2d 668, 676 (1966). This rule is founded on public policy and operates, independently of any actual fraud, to prevent fraud. The Court in *Spikler* specifically declared that the fact that the contract was in writing would not thwart the policy, and in fact, the Court would enforce the policy all the more strenuously where the contract beneficial to the attorney had been executed long after the attorney-client relationship had commenced.

Such are the circumstances in this case. The Court is not questioning the good faith of counsel. It does raise a question of equity—whether the Court can, in good conscience, enforce a contract made with class members, who more likely than not, lack the sophistication, experience and education to act understandingly and deal with their attorneys on an equal basis at arms length. There is no showing that the class had the assistance of independent counsel when agreeing to the fee; the consents were obtained from retired miners whose relationship to counsel was the result of judicial determination; the consents were obtained after counsel knew the outcome of the case; and the amounts of the contingent fee contracts are excessive in light of the actual legal services necessary to succeed in this public interest suit.

It is ingrained in the policy of determining reasonable attorney's fees, that an attorney is entitled to no more than a reasonable fee, no matter what fee is specified in the contract, because an attorney, as a fiduciary, cannot bind his client to pay a greater compensation for his services than the attorney would have the right to demand if no contract had been made.

⁶ This is the same percentage which Judge Gesell used in *Blankenship*.

⁷ As was noted *supra*, the Court does not anticipate the need for any substantial future services, in light of the Union and Fund's compliance with the Court's directive to use the Union's field representatives to personally contact the class members and assist them to become enrolled.

Therefore, the Court finds the consents, for whatever binding value they may have, to be null and void as against public policy.

Considering the background and facts of this case, as well as the actual effort needed to win, the amount awarded to class counsel not only provides adequate compensation on an hourly basis but also includes a sufficient incentive for the work done.

V. THE INTERVENOR'S ATTORNEY'S FEES AGREEMENTS ARE VOID AS AGAINST PUBLIC POLICY UNDER THE SPIKLER RULE, AND THE FEES MUST BE DETERMINED ON A QUANTUM MERUIT BASIS

The Court finds that under the *Spikler* rule discussed above, the intervenors must be treated on the same basis as the members of the entire class. The Court finds each of the intervenors' contracts like those of the *Kiser* class, to be unconscionable and void as against public policy. The Court based its findings on the following facts:

(1) that most of counsel's efforts were merely duplication of class counsel's efforts, and even at that were quite brief with little evidence of legal research and

(2) that the contracts with all intervenors, except Mr. Moore and Mr. Adkin's, were signed long after the commencement of the attorney-client relationship;⁸ and

(3) the fees were excessive for the productive efforts actually expended; and

(4) as in the case of the *Kiser* class, it can not be said that the parties, namely the intervenors, and their counsel were on an equal basis; and

(5) it is undisputed that a fiduciary relationship exists between counsel and their clients; see, *Spikler, supra*; *Udall, supra*; and

(6) the benefits created for the intervenors and the class were of a special nature. In other words, retroactive pension benefits obtained as a result of 20 years work in the coal mines and the reaching of 55 years is meager to say the least. For counsel to benefit from the illegal actions of the defendant trustees and their predecessors would be inconsistent with the high duties of the legal profession to assist the disadvantaged and the down-trodden when in need of legal help.

In saying this, the Court is not unaware of the expenses involved in maintaining a law office and the facilities necessary to provide the kinds of services rendered by all counsel in this case. However, it must again be said that an attorney's public duty represents a higher calling than that of his private or personal interests. Therefore, the Court finds in light of the above considerations the award of fees herein should be determined on a *quantum meruit* basis.

Considering that the *Moore* counsel expended only 130 hours in the case it is impossible to say that \$21,791 in attorney's contingency fees is reasonable, and it would be unconscionable to tax meager lifetime pension benefits to this extent on a *quantum meruit* basis. It is apparent from counsel's diaries that the *Moore* attorney is judicious in the use of his time. However, since the diaries also indicate a good percentage of the time spent was for telephone calls, conferences with other counsel and the attorneys fees question, the Court has discounted the time actually spent by 30%, and multiplied the balance (91) by \$40, resulting in an award of a reasonable fee of \$3,640 to counsel for *Moore, et al.*

The Court will award the *Adkins* group attorneys with the same amount as it did the *Moore* group. After studying the papers filed and diaries submitted, the attorneys for this group should have spent no more time than the *Moore* group attorney. Although the Court recognizes that different attorneys work at different speeds, the Court finds the number of hours the *Moore* counsel spent a better reflection of the actual result produced, and, therefore, applied the same time factor and hourly rate as used to determine the award for the *Moore* group's attorney, \$3,640.

⁸ Mr. Hensley's agreement was signed March 12, 1973; Mr. Madden's, March 3, 1972; Mr. Walker and Mr. Smith were notified in a letter from counsel of a contingent fee of 25% of their recovery on April 21, 1972; there is no showing that the men agreed to this amount in writing or otherwise.

VI. THE COURT HAS THE EQUITY POWER TO TAX ATTORNEY'S FEES AGAINST THE DEFENDANT FUND FOR THE DOMINATING REASONS OF JUSTICE

This Court has equity jurisdiction to impose attorney's fees upon the defendant "in exceptional cases and for dominating reasons of justice." *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939). Whereas, the Court is mindful of the long standing practice of deducting attorney's fees from the class recovery, so that the burden of the litigation is spread over the entire class benefiting from the suit, an exception exists in this case. Justice requires that the Defendants pay the costs and attorney's fees incurred in this suit to compel the Defendants to discontinue their protracted discriminatory conduct and breach of fiduciary duty. *Vaughan v. Atkinson*, 369 U.S. 527, 530-31 (1962); *Rolax v. Atlantic Coast Line R. Co.* 186 F.2d 473, 481 (4th Cir. 1951).

At a hearing on August 1, 1973 on the matter of attorneys' fees, counsel for the Defendant Trustees also acknowledged the Court's discretionary power to impose upon them the award of the attorneys' fees for both the class and intervenors. The Defendants raised the question, however, whether the Court should do so, when the effect might be to further limit the fund from instituting the new Trust benefits. The Court realizes that in taxing the Fund, the Fund beneficiaries are the ones who will actually bear the burden. In this instance the Court finds the imposition would neither be burdensome nor unjustified. The Court based its findings on the facts that the award is a reasonable and modest one, and that the entire Fund benefited from this suit with the prevention of general fiduciary abuse and improvement of the institutional functioning of the Fund as an entity. *Mills v. Electric Auto Lite Co.*, 396 U.S. 375, 391-92 (1970).

Furthermore, the Court will require the Defendant to pay all legitimate expenses incurred by the parties, as provided by Rule 54(d) of the Federal Rules of Civil Procedure.

The total amounts that the Defendant is ordered to pay are as follows:

(a) Kiser class attorneys:	
Attorneys fees	\$62, 048. 00
Expenses	2, 725. 00
Total	\$64, 773. 00
(b) Moore intervenors:	
Attorneys fees	\$3, 640. 00
Expenses	891. 32
Total	\$4, 531. 32
(c) Adkins intervenors:	
Attorneys fees	\$3, 640. 00
Expenses	276. 75
Total	\$3, 916. 75

An Order will be entered in accordance with this Opinion.

CHARLES R. RICHEY,
U.S. District Judge.

Dated: August 29, 1973

United States Court of Appeals For the First Circuit

No. 72-1219

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
PROJECT ON CLEAN AIR,
RHODE ISLAND TUBERCULOSIS AND
RESPIRATORY DISEASES, INC.,
and ELLERBE W. ACKERMAN, JR.,
PETITIONERS,

v.

ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT.

No. 72-1224

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
PROJECT ON CLEAN AIR, ET AL.,
PETITIONERS,

v.

ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT.

ON PETITIONERS' MOTION FOR COSTS AND ATTORNEYS' FEES

Before COFFIN, *Chief Judge*,
ALDRICH and CAMPBELL, *Circuit Judges*.

Richard E. Ayres and Thomas B. Arnold for petitioners.

Thomas C. Lee, Attorney, Department of Justice, with whom *Kent Frizzell*, Assistant Attorney General, *Edmund B. Clark*, and *Martin Green*, Attorneys, Department of Justice, were on brief, for respondent in case 72-1219.

John P. Hills, Attorney, Department of Justice, with whom *Kent Frizzell*, Assistant Attorney General, *Edmund B. Clark*, and *Martin Green*, Attorneys, Department of Justice, were on brief, for respondent in case 72-1224.

October 1, 1973

CAMPBELL, *Circuit Judge*. Petitioners in *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 478 F.2d 875 (1st Cir. 1973), now request this court to award them attorneys' fees as well as costs against the Environmental Protection Agency [EPA] for their efforts in obtaining orders requiring EPA to comply with certain of its obligations under the Clean Air Amendments of 1970, 42 U.S.C. §§ 1857c-5 *et seq.* We hold that petitioners are entitled to recover reasonable attorneys' fees and costs.

Traditionally, a prevailing party usually receives costs but not attorneys' fees. Compare Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 Calif. L. Rev. 792 (1966), McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 Minn. L. Rev. 619 (1931), and Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. Legal Studies 399, 428, 437 (1973) with Goodhart, *Costs*, 38 Yale L.J. 849 (1929) and Note, *Distribution of Legal Expenses Among Litigants*, 49 Yale L.J. 699 (1940). Moreover, sovereign immunity would prevent a court, without congressional consent, from awarding even costs against the federal government or one of its agencies. Only in 1966 did Congress, by statute of general application, waive immunity from conventional costs; but the broad waiver still does not extend to attorneys' fees. 28 U.S.C. § 2412, *infra*; *United States v. Chemical Foundation, Inc.*, 272 U.S. 1 (1926); *Cassata v. Federal Savings & Loan Insurance Corp.*, 445 F.2d 122 (7th Cir. 1971).

An early judicially-created exception to the no-fees rule was that attorneys' fees might be taxed to a private party who had sued or defended in bad faith. The award was to punish frivolous or ill-motivated litigation. See, e.g., *Knight v. Auciello*, 453 F.2d 852 (1st Cir. 1972); Comment,

The Allocation of Attorney's Fees After Mills v. Electric Auto-Lite Co., 38 U. Chi. L. Rev. 316, 317-23 (1971). Another exception was made in equity proceedings where a plaintiff recovered, through the litigation, a fund in which others were entitled to share. Costs "as between solicitor and client" were allowed to be paid from the fund not to punish the loser, but to prevent unfair advantage to non-litigant beneficiaries. *See, e.g., Trustees v. Greenough*, 108 U.S. 527, 532 (1882). *Cf. Philadelphia v. Chas. Pfizer & Co.*, 345 F. Supp. 454, 482-83 (S.D.N.Y. 1972).

Building upon the "fund" rationale, courts allowed attorneys' fees in other situations where to do so resulted in a more equitable allocation of the costs of suit among all who benefitted. *See, e.g., Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939) (plaintiff's victory, in consequence of *stare decisis*, established the claims of fourteen other trusts pertaining to the same bonds; fees were assessed against the bonds.) *Cf. Hornstein, Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards*, 69 Harv. L. Rev. 658 (1956). Recently the notion of spreading the litigation costs equitably among all the beneficiaries has been coupled with that of encouraging suits which promote the public interest.¹ *Newman v. Piggie Park*

¹ Some courts have drawn a sharp distinction between "benefit" cases in which the suit serves the interests of a limited group, and "private attorney general" cases in which the whole public is the beneficiary either because it receives a boon directly or because some "strong public policy" is vindicated. *See, e.g., La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972) and cases cited therein. *Cf. Hall v. Cole*, 412 U.S. ___, ___ n.7, 41 U.S.L.W. 4658, 4660 n.7 (1973). However, after *Hall* and *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), the concept of "benefit" includes any improvement, financial or otherwise, provided to the beneficiary group. Whether that group is limited or includes the whole public should therefore ordinarily not affect the form of analysis. The number of beneficiaries would be important only when the court needed to determine whether the benefit was sufficiently large to justify an award of fees, or when the fees would be calculated to relate to the quantum of benefit.

Enterprises, Inc., 390 U.S. 400 (1968); *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971); *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972); *Sims v. Amos*, 340 F. Supp. 691 (M.D. Ala. 1972). When private litigation vindicates a significant public policy and, at the same time, creates a widespread benefit, policy today favors awarding attorneys' fees against a party who exists to serve or represent the interests of all those benefitted. Thus in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), a corporation was made to shoulder the cost of litigation that benefitted all shareholders and simultaneously supported the policy of the securities laws. In *Hall v. Cole*, 412 U.S. —, 41 U.S.L.W. 4658 (1973), a union was made to pay the attorneys' fee of disappointed union office seekers who had sued the union; the plaintiffs' victory aided the entire membership by furthering union democracy. *But cf. Bradley v. School Board*, 472 F.2d 318 (4th Cir. 1972), *cert. granted*, — U.S. —, 41 U.S.L.W. 3644 (1973). While the above cases do not go so far as to exact attorneys' fees from an agency of the federal government, courts have often awarded fees against state agencies or officials. *Ojeda v. Hackney*, 452 F.2d 947 (5th Cir. 1972); *Taylor v. Perini*, 359 F. Supp. 1185 (N.D. Ohio 1973) (civil rights); *La Raza Unida v. Volpe*, 57 F.R.D. 94, 101-102 n.11 (N.D. Cal. 1972) (environmental protection); *Sims v. Amos*, 340 F. Supp. 691, 694 n.8 (M.D. Ala. 1972) (reapportionment); *NAACP v. Allen* 340 F. Supp. 703, 708, 710 n.10 (desegregation). *See also* Note, *Allowance of Attorney Fees in Civil Rights Litigation Where the Action is not Based on a Statute Providing for an Award of Attorney Fees*, 41 Cinn. L. Rev. 405 (1972).

In the present case (putting aside for the moment the issue of sovereign immunity) the principles mentioned

favor an award of attorneys' fees against the EPA. Petitioners have usefully championed the policy of the Clean Air Amendments of 1970, 42 U.S.C. §§ 1857c-5 *et seq.*, to "clear the air." They have sought to compel strict compliance by the EPA with legislation the purpose of which is to "speed up, expand, and intensify the war against pollution in the United States with a view to assuring that the air we breathe throughout the nation is wholesome once again." H.R. Rep. No. 91-1146, 91st Cong., 2d Sess. 2 (1970). Congress has, indeed, shown a desire to pursue its goal with the assistance of such private litigants.² In the House Report just quoted the "regrettably slow" progress in controlling air pollution is blamed on a scarcity of skilled personnel available to enforce control measures and on a lack of aggressiveness by EPA's predecessor agency in enforcing the law. The public suit seems particularly instrumental to the statutory scheme when against the EPA itself, for only the public—certainly not the polluter—has the incentive to complain if the EPA falls short in one or another respect; yet the lack of measurable interest on the part of any individual member of the public, and the difficulties inherent in complex litigation in a rapidly developing field of law, make the economics of citizen suits a serious problem.

In any event, petitioners have activated traditional adversary machinery for bringing issues before a court. As a result, policies of the EPA have been corrected and others, upheld, have been removed from the arena of dispute. Presumptively the public has benefitted—not only in Rhode Island and Massachusetts but nationally, as neither air pollution nor the movement of citizenry respect state

² Clean Air Amendments of 1970 § 304, 42 U.S.C. §1857h-2. The Amendments contain numerous other provisions for public participation, *e.g.*, § 1857c-5(a)(2)(F) (release of emission data to the public); §§ 1857c-5(a)(1), (a)(2), and (f)(2)(A) (public hearings on original implementation plan and any revisions or postponements).

boundaries, and some of the legal principles at issue have national as well as regional import. Petitioners have thus helped to enforce, refine and clarify the law. They can be said to have assisted the EPA in achieving its statutory goals.

Under the circumstances it seems fair and sensible that the EPA should be taxed for petitioners' reasonable costs and attorneys' fees. The EPA has been assigned by Congress the task of supervising pollution control. It handles the public funds appropriated for that purpose. To allocate petitioners' reasonable costs and attorneys' fees to it is to spread them ultimately among the taxpaying public, which receives the benefits of this litigation. The EPA stands here in the same relation to the citizen as did the corporation in *Mills* to its shareholders and the union in *Hall* to its members. See Comment, *The Allocation of Attorney's Fees After Mills v. Electric Auto-Lite Co.*, 38 U. Chi. L. Rev. 316, 329-36 (1971).

Sovereign immunity, however, poses a problem that was not present in *Mills* or *Hall*. Prior to 1966 the controlling general statute, 28 U.S.C. § 2412, provided flatly that "[t]he United States shall be liable for fees and costs only when such liability is expressly provided for by Act of Congress." 62 Stat. 973 (1948). This was consistent with the Supreme Court's earlier formulation in *United States v. Chemical Foundation, Inc.*, *supra*, 272 U.S. at 20 that "[t]he general rule is that, in the absence of a statute directly authorizing it, courts will not give judgment against the United States for costs or expenses." The Court there held that officials of the United States could not, by the act of bringing suit for the government, waive its sovereign immunity against the imposition of costs and fees. Only Congress could do so.

Congress liberalized § 2412 in 1966. It now provides:

"Except as otherwise specifically provided by statute,

a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against . . . any agency . . . of the United States . . . in any court having jurisdiction of such action”

The intent, as stated in the House of Representatives committee report, H.R. Rep. No. 89-1535, 89th Cong., 2d Sess. (1966), was to provide for fair and uniform treatment as between the government and a private litigant: as matters had stood, the United States, if it prevailed, could collect costs, but the citizen, if he prevailed, could not. The House committee report concluded:

“Apparently the present inequality is related to a governmental advantage derived from the principle favoring immunity of the sovereign from suit. Under modern conditions, there is no reason for this advantage when the law provides for suit against the Government.” 1966 U.S. Code Cong. & Admin. News 2528.

Nonetheless, the blanket waiver did not extend to attorneys’ fees. The Seventh Circuit has since held that when Congress is otherwise silent courts still may not award attorneys’ fees against the government. *Cassata v. Federal Savings & Loan Insurance Corp.*, *supra*. The history of § 2412 reflects, it is true, a strong movement by Congress toward placing the federal government and civil litigants on a completely equal footing.³ Yet we may not ignore its

³ The legislative history provides no clues concerning Congress’ reasons for broadly excluding awards of attorneys’ fees. Such a result might seem to be inconsistent with the express desire to eliminate the “unfair” advantage possessed by the United States by virtue of its sovereign immunity. At the time of the enactment, however, the award of fees was still rare in American law and was often disfavored by the courts. See, e.g., *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967). The omission may simply have been a reflection of the prevailing American rule, preserving to Congress the option of reversing the rule when justice required.

plain wording. To award attorneys' fees against a governmental agency, we must first find that Congress has given specific statutory sanction. Here, we find such sanction in the language of the Clean Air Amendments themselves.

The Amendments § 304(d), 42 U.S.C. § 1857h-2(d),⁴ expressly authorize the award of attorneys' fees in any suit brought pursuant to § 304(a), 42 U.S.C. § 1857h-2(a). Section 304(a) allows any citizen to commence suit, without regard to the amount in controversy, "against the Administrator [of the EPA] where there is alleged a failure of the Administrator to perform any act or duty under [the Amendments] which is not discretionary with the Administrator." The provision would aptly cover this case, the essence of which is the claim that the Administrator failed to perform his duty with respect to the review and approval of state implementation plans.

The difficulty is that § 304 on its face deals only with litigation in the District Court. This case was brought pursuant to § 307, 42 U.S.C. § 1857h-5(b)(1), providing that "[a] petition for review of the Administrator's action in approving or promulgating any implementation plan . . . may be filed only in the United States Court of Appeals for the appropriate circuit." If petitions under § 307 are *not* actions brought pursuant to § 304(a), then the attorneys' fee authorization in § 304(d) would not be available as an exception to 28 U.S.C. § 2412. On the other hand, if the enabling provisions of § 304(a) also apply to actions under § 307, attorneys' fees are specifically allowed.⁵

⁴ "The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. . . ."

⁵ The government contends that § 304(d), even if applicable to this case, does not authorize the award of fees against the government. This reading of the statute is in sharp conflict with its plain words, which authorize the award against "any party" and which, in § 304(a), specifically authorize suits with the United States as a party.

We must decide between these alternatives.⁶

While the statutory language is confusing, both common sense and the legislative history lead us to conclude that a petition for review is to be regarded as an action pursuant to § 304(a). Section 307 designates the forum, *Getty Oil Co. (Eastern Operations) v. Ruckelshaus*, 467 F.2d 349 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); it goes no further. The authorization for, and conditions of, suit are contained in § 304(a). The legislative history reveals that § 307 does no more than direct that some proceedings must be brought in the circuit courts.

Section 307 originated in the Senate; the House version required all suits to be brought in the district court. 1970 U.S. Code Cong. & Admin. News 5389. The Senate committee wanted to consolidate review of implementation plans in the circuits because many plans were regional or even national in scope, and numerous suits in many districts might be avoided by requiring a single suit in a central forum. S. Rep. No. 91-1196, 91st Cong., 2d Sess. 41 (1970). The committee also believed that requiring implementation plans to be challenged, if at all, only in the circuit courts would “maintain the integrity of the time sequences provided throughout the Act.” *Id.* Since statutory goals were to be achieved within three years of the approval of the implementation plan, it was important to conserve time by eliminating the otherwise normal first

⁶ A third alternative is that, since § 304 mentions attorneys’ fees and § 307 makes no mention of them within the section, the court must infer that Congress deliberately chose to exclude attorneys’ fees from the remedies available under § 307. That same contention was made to, and expressly rejected by, the Supreme Court in *Hall v. Cole*, 412 U.S. ___, 41 U.S.L.W. 4658 (1973) and *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970). Courts are to draw such a negative inference only when the legislative history is clear or when Congress has prescribed such “intricate remedies”, *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967), as logically to exclude the possibility of nondescribed remedies. Section 307 makes no mention of remedies.

step in the judicial process. Challenges to other acts of the Administrator, and enforcement suits brought against polluters, were left to the district courts because delay and disparate initial decisions would not present serious obstacles.

Neither reason for directing some cases to the circuit courts indicates a congressional desire to make the allowability of attorneys' fees depend on the forum of the suit. Indeed, some of the changes the Senate bill underwent in Conference Committee reflect the opposite desire. The original provision had specified that "[a]ny interested person may file a petition...for review" of the implementation plans in the circuit courts. While "interested person" is equivocal as to who has standing to sue, the Senate committee report, S. Rep. No. 91-1196, 91st Cong., 2d Sess. 41 (1970), noted that the bill would protect the right of "those who seek to protect the public interest" to bring an action challenging an implementation plan. This effectively would have repeated the universal standing provision of § 304(a). When the Conference Committee reported out the bill, the Senate's standing provision was missing. The Conference Committee apparently contemplated that the standing provisions of § 304(a) would be applicable to § 307 suits: the report states that § 307 "specif[ies] forums for judicial review of certain actions...*provided for* under the Act and the proposed amendments." [Emphasis added] 1970 U.S. Code Cong. & Admin-News 5389. Other sections "provided for" the review; § 307 merely specified a forum. The section providing for review of actions of the Administrator is § 304(a), and since § 304(a) specified that standing was universal, there was no need to repeat the allowance in § 307. Similarly, § 304 provided for attorneys' fees where appropriate, and there was no need to repeat the provision in § 307.

This conclusion as to the scope of § 304(a) is also

supported by the legislative history of the inclusion in § 304(a) of a provision for citizen suits without any requirement that the plaintiff be a person aggrieved. This provision, like § 307, originated in the Senate. According to the Senate committee report, citizen suits would be an invaluable aid in the enforcement of pollution control standards once they had been promulgated. The committee realized that federal or state enforcement resources might be insufficient, and that federal agencies themselves might sometimes be polluters; the citizen suit provision created “private attorneys general” to aid in enforcement. But while most of the attention of the committee was directed to these enforcement suits, the committee was careful to note that the citizen suit concept applied as well to other actions taken by the EPA.

“The Committee bill would provide in the citizen suit provision that actions will lie against the [Administrator] for failure to exercise his duties under the Act, including his enforcement duties. The Committee expects that many citizen suits would be of this nature ...” S. Rep. No. 91-1196, 91st Cong., 2d Sess. 38-39 (1970).

The committee thus apparently contemplated that suits such as the present one would fall within the citizen suit provision, and consequently qualify for appropriate awards of attorneys’ fees under § 304. When the bill reached the Senate floor, Senator Muskie, the bill’s floor manager, answered criticism of the citizen suit provision by inserting in the record a memorandum stating that “[t]he concept in the bill is that administrative failure should not frustrate public policy and that citizens should have the right to seek enforcement where administrative agencies fail.” 116 Cong. Rec. 33102 (1970). The policy of the Amendments is no less frustrated if the EPA approves an inadequate plan than if it fails to enforce an adequate

plan. The Senate so understood when it included in the citizen suit section the provision authorizing citizen suits against the Administrator for failure to perform *any* act required by the Amendments.

The potential award of attorneys' fees was a logical complement to the right to bring citizen suits. The Senate committee foresaw that such awards would fulfill two important tasks. First, the potential for an award would encourage citizens to bring meritorious actions. Without the possibility of fees many meritorious actions would never be brought, since the plaintiff would face a certainty of attorneys' fees far higher than any personal gain he would reap if victorious. With attorneys' fees, it would financially be possible for such actions to be brought. See Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. Legal Studies 399, 428, 437 (1973). "[I]n bringing legitimate actions under this section citizens [are] performing a public service and in such instances the courts should award costs of litigation to such party." S. Rep. No. 91-1196, 91st Cong., 2d Sess. 38 (1970).

Second, the committee noted that many Senators had expressed concern that some would abuse the citizen suit provision by bringing frivolous or harassing actions. The attorneys' fee provision was conceived as a primary deterrent to such actions, for the court could award to defendants the full costs of their defense in order to deter meritless suits.

The same considerations apply to actions brought in the circuit courts to challenge the EPA's approval of state implementation plans. The award of fees encourages suits that help the EPA to perform its difficult task. At the same time, "the court could...award costs of litigation to defendants where the litigation was obviously frivolous

or harassing.” *Id.* The court could also discourage such litigation merely by forcing the plaintiff to bear his own attorneys’ fees.

Taking together the wording of § 304, the legislative history of § 307, and the legislative history of the citizen suit provision, we think that Congress specifically intended that proceedings brought pursuant to § 307, 42 U.S.C. § 1857h-5(b)(1), were to be entitled to the benefits and deterrents expressed in § 304(d) via § 304(a). The requirement of 28 U.S.C. § 2412 that attorneys’ fees be awarded only when specifically authorized has been satisfied. We conclude that we are empowered, in our discretion, to award such fees, as well as costs, against the EPA. We are also persuaded that reasonable costs and fees should, in this case, be awarded to petitioners.⁷

We are not impressed by the government’s argument that because some issues were decided adversely to petitioners each party should bear its own costs. The authorizing language of § 304(d) permits an award “to any party, whenever the court determines such award is appropriate.” This suggests greater latitude even than is found in 28

⁷ The government argues that, even though otherwise eligible, public interest organizations “formed for the purpose of litigating against the government” and endowed with “tax exempt status” should be denied attorneys’ fees. In the alternative the government argues that fees of petitioners’ staff counsel should be denied. We can find no support for such contentions in the legislative history or the words of the statute. Quite the contrary, Congress recognized that public interest organizations would conduct a great deal of litigation under the Amendments. And the Amendments themselves provide for the award of fees to “any party.” 42 U.S.C. § 1857h-2(d). If Congress desired to use the award of fees to encourage meritorious litigation and discourage frivolous suit, the identity of the party, and the source of its counsel, would be of little moment. *See generally Miller v. Amusement Enterprises, Inc.*, 426 F.2d 534, 538-39 n.14 (5th Cir. 1970); *Woolfolk v. Brown*, 358 F. Supp. 524, 536 (E.D. Va. 1973); *La Raza Unida v. Volpe*, 57 F.R.D. 94, 98 n.6 (N.D. Cal. 1972).

U.S.C. § 2412, which authorizes awards to “the prevailing party”. We are at liberty to consider not merely “who won” but what benefits were conferred. The purpose of an award of costs and fees is not mainly punitive. It is to allocate the costs of litigation equitably, to encourage the achievement of statutory goals. When the government is attempting to carry out a program of such vast and uncharted dimensions, there are roles for both the official agency and a private watchdog. The legislation is itself novel and complex. Given the implementation dates, its early interpretation is desirable. It is our impression, overall, that petitioners, in their watchdog role, have performed a service.

Were we to believe that the litigation were wholly or in substantial part frivolous, we would not, of course, award costs of any description to petitioners. In such cases, indeed, we reserve the right to award costs and fees in favor of the EPA. But the challenges here, even those not sustained, were mainly constructive and reasonable. And petitioners were successful in several major respects; they should not be penalized for having also advanced some points of lesser weight.

As the government has not addressed in detail the question of the reasonableness of petitioners’ requested sum, we now ask the parties to submit memoranda on that question. We will scrutinize carefully the requested costs and fees. Petitioners are not a public agency and are legally responsible to no one but themselves; we must satisfy ourselves that the taxpayers’ money will not be used to support needless or excessive legal items. We must also recognize that petitioners, as surrogate attorneys for the interests of the public and the EPA, have volunteered and “imposed” their services on “clients” that never

contracted for them. As attorneys for involuntary clients, their fees may properly be less than those they could have received by entering the marketplace and selling their services to the private client who would make the highest bid for them.

So ordered.

UNITED STATES DISTRICT COURT
 WESTERN DISTRICT OF TEXAS
 SAN ANTONIO DIVISION

FILED
Wm. H. [illegible]

SIERRA CLUB, ET AL.

X

X

V.

X

CIVIL ACTION NO. SA72CA77

X

JAMES T. LYNN, ET AL.

X

ORDER AND MEMORANDUM OPINION

On the 21st day of August, 1973, came on to be considered defendant San Antonio Ranch, Ltd.'s motion for reconsideration of the Court's order of June 28, 1973 approving the award of attorneys' fees, the motion of citizen plaintiffs for continuation or restoration of injunction during the pendency of appeal, and motions by both the citizen plaintiffs and the United States Department of Housing and Urban Development to tax expenses of certain witnesses as costs of court. Having reviewed the facts of this case, in addition to the briefs and affidavits filed, and authorities cited, this Court is of the opinion and finds that attorneys' fees, costs and expenses should be awarded to citizen plaintiffs in the total amount of \$20,000.00; that the motion for injunction during the pendency of appeal should be denied; and that the motions filed by plaintiffs and HUD seeking to tax costs relating to the travel, subsistence, attendance, or other expenses of certain witnesses should be denied.

A. ATTORNEYS' FEES

Defendant San Antonio Ranch, Ltd. (SAR) insists that attorneys' fees can only be awarded to a successful litigant. Though the judgment entered in this cause clearly and unequivocally denied all relief sought by the plaintiffs, it does not necessarily constitute the sole basis for determining the success or failure of plaintiffs in bringing the

1/
 lawsuit. As noted in this Court's order of June 28, 1973, the "final" Environmental Impact Statement filed by HUD on January 23, 1972 did not, in truth and in fact, fully comply with the law, though by the time this litigation was completed such compliance had been achieved through further extensive study, research, public discussion, and planning on the part of HUD, as well as many other governmental agencies and private parties. In addition to the public meetings held by the Water Quality Advisory Review Board, composed of 18 public agencies, which resulted in that Board's approval of the project (an action that should have been taken before HUD made its final commitment), the study made by Dr. Henry V. Beck ("Evaluation of Water Quality Studies on San Antonio Ranch, New Town") was published, as was the study on storm water runoff conducted by Dr. W. H. Espey, Jr. All of these very important events took place subsequent to the filing of this lawsuit. It is almost axiomatic that vital reports concerning the safety of the proposed project could not be evaluated fully by all governmental agencies involved, as contemplated by the NEPA, until they were completed and circulated. As a consequence, from the time the injunction in this case was originally filed to the time the trial was completed, the facts and record had changed so substantially as to make this an entirely different lawsuit. And it should be noted that the direct holding of this Court in its Memorandum Opinion of July 17, 1973 was "that the addendum to the Final Environmental Impact Statement, issued August 24, 1972 meets all the requirements for the 'detailed statement' required by NEPA, 42 U.S.C.A. §4332(C)." The addendum, which included 77 exhibits, amounting to over a foot and a half of papers, was a document far different from the first "final" Environmental Impact Statement. Essentially, the plaintiffs forced heretofore

1/ See *Globus, Inc., v. Jaroll*, 279 S. Supp. 807 (S.D.N.Y. 1968), where in a stockholders' derivative action based upon misleading use of a proxy statement concerning a stock option, cancellation of the stock option before completion of the suit made the case moot, and yet in the face of the result which plaintiff requested having been achieved prior to judgment, his claim for attorneys' fees was still considered.

untested hypotheses to be subjected to rigorous study which did in fact reveal the project to be safe, forcing both the government and SAR to do what they should have done of their own initiative in the first place, before the final environmental impact statement was issued, and turning a preliminary hypothesis as to safety into a much more logical and reasonable conclusion. Prior to the filing of the lawsuit there was no firm assurance that all of the studies eventually done would be done, even under the moratorium imposed by HUD as a condition of their grant..

Defendant SAR maintains that Hall v. Cole, 93 S.Ct. 1943 (1973), specifically allows only two exceptions to the general American rule denying attorneys' fees under the Court's equitable powers: 1) when an opponent has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons"; and 2) cases in which substantial benefits have been conferred upon members of an ascertainable class, where the court's jurisdiction makes possible an award to spread the costs proportionately among the members of the class. This Court does not agree with that interpretation. Nowhere in Hall v. Cole does the Court limit the inherent equitable power of the federal courts to award attorneys' fees (specifically noted in the decision) to those situations exclusively. A careful reading of Hall v. Cole would seem to support the conclusion of one observer following the decision in Mills v. Electric Auto-Lite:

"Where previously the courts were led to start with the traditional rule and then ascertain whether the case fell into one of the three Fleischmann-approved exceptions, now they are to start with the equitable power of the courts to grant appropriate remedies with the burden on the other side to prove a legislative 'purpose to circumscribe the courts' power.'" 38 CHI.L.REV. 316 (1971) at 325.

Moreover, in the recent case of Ojeda v. Hackney, 452 F.2d 947 (1972), the Fifth Circuit stated:

"In sum, the equitable propriety of the allowance of any amount of attorneys' fees, and the manner in which these

fees, if allowed, are to be collected, is committed entirely to that court's sound discretion..." (at 948)

Thus even if the judgment in the above entitled case were read as totally unfavorable to the plaintiffs, and resulting in none of the relief which they originally sought, it would still remain within the inherent equitable power of the Court to award attorneys' fees if so prompted by "overriding considerations" indicating the need for such a recovery. Hall v. Cole, 93 S.Ct. at 1946.

In the instant case these overriding considerations consist of the public service rendered by the plaintiffs, who through this litigation have helped ensure the purity and continued viability of the water in the Edwards Underground Aquifer. Attorneys' fees have been granted many times in the well recognized instances in which plaintiffs serve as "private attorneys general", and are thereafter compensated because their efforts have served the public interest, by ensuring the effectuation of a strong Congressional policy. Lee v. Southern Home Sites Corp., 249 F.2d 290 (5th Cir. 1970). The same holds true in civil rights cases. See Cooper v. Allen, 467 F.2d 836, 841 (5th Cir. 1972). There is no reason why the protection of the public interest in this environmental case should be treated any differently.

The attorney for citizen plaintiffs in the instant case indicated in his affidavit that over 1,185 hours were spent in preparation and trial of this litigation, and all parties stipulated that the time sheets submitted in such affidavit were correct. In this connection, the Court finds that during the period from approximately February 1972 until October 1972, the attorney for citizen plaintiffs devoted 210 hours of the time set forth in the affidavit to his representation of Bexar County, a plaintiff which did not request and was not granted attorneys' fees in this Court's order of June 28, 1972. Accordingly, the time spent on behalf of Bexar County will not be considered as a basis for compensation.

The award of attorneys' fees is not intended to make either the client or the attorney whole, nor in any means fully compensate counsel for the time expended in this extended and complex litigation which has stretched out over a period of a year and a half. The Court does not feel that the minimum fee schedule of the State Bar of Texas may be used as a proper basis for measuring the rate of compensation to be awarded in a case such as this. Nor does the Court find that the fee a practicing attorney would charge a private client, willing and able to pay, to be appropriate in this case. Rather, considering the Criminal Justice Act, and the purposes of that Act, the Court finds that the statutorily enumerated rate of compensation set out in 18 U.S.C. §3006A(d) (1972), is a reasonable guide for setting compensation in public interest civil litigation. That section provides for compensation at the rate of \$30 an hour for time spent in court, and \$20 an hour for out-of-court time. As noted by District Judge Frank Johnson: "It is the duty of members of the legal profession to represent clients who are unable to pay for counsel and also to bring suits in the public interest". Wyat. v. Stickney, 344 F.Supp. 387, 410 (M.D.Ala. 1972). The rates set out by the CJA provide neither unjust enrichment nor undue impoverishment of counsel who commendably bear a large share of the public responsibility of the legal profession.

Having considered the Criminal Justice Act, the approximate number of hours expended in this litigation, plus the complexity and novelty of this case, the skill and outstanding service performed by the opposing counsel, the importance and beneficial result of this litigation to the public, expenses paid by plaintiffs totalling \$2,620.79, costs incurred in securing witnesses, and all the facts and circumstances of the case, this Court finds that \$20,000.00 is a fair and reasonable amount to cover the fees, costs and expenses incurred by them.

B. MOTIONS TO TAX COSTS

The Department of Housing and Urban Development requests that certain costs be taxed against citizen plaintiffs, and the citizen plaintiffs request that certain other costs be taxed against the defendants. These motions are made pursuant to Rule 54(d) of the Federal Rules of Civil Procedure, and 28 U.S.C. §§ 1821 and 1920.

(1) Motion by Plaintiffs -

Plaintiffs have asked for a total award of costs in the sum of \$968.40 to cover travel and other expenses of certain witnesses. However, in light of the award of \$20,000.00 herein made to cover their fees and expenses, plaintiffs' motion should be and the same is hereby denied.

(2) Motion by HUD -

The Department of Housing and Urban Development has requested total fees for travel, subsistence and attendance of \$1,889.60. The Court does not dispute any of the specific costs claimed by defendant, but since, as already indicated, the award of attorneys' fees would have been spread equally between San Antonio Ranch, Ltd. and HUD, if it were not for the prohibition of 28 U.S.C. §2414, this Court is of the opinion that it is appropriate under the provision of Rule 54, Federal Rules of Civil Procedure to deny such costs to HUD.

C. MOTION FOR CONTINUATION OR RESTORATION OF INJUNCTION DURING THE PENDENCY OF APPEAL

Plaintiffs have alleged in their motion for continuation or restoration of injunction during the pendency of appeal that, absent such an injunction, irreparable damage will be done to the surface cover of the Edwards Underground Aquifer, and that irrevocable financial commitments will be made by HUD and private investors. The allegation of irreparable injury is only one of the four conditions necessary to justify the issuance of an injunction pending appeal. Other required

are that a party seeking such an injunction must make a strong showing that he is likely to succeed on the merits of the appeal, that no substantial harm will result to the other parties due to the injunction, and that the injunction will serve the public interest. Blackshear Residents Organization v. Romney, 472 F.2d 1197 (5th Cir. 1973); Beverly v. United States, 468 F.2d 732 (5th Cir. 1972); Fortune v. Molpus, 431 F.2d 799 (8th Cir. 1970); Pitcher v. Laird, 415 F.2d 743 (5th Cir. 1969); Belcher v. Birmingham Trust National Bank, 395 F.2d 685 (5th Cir. 1968).

Not only have the plaintiffs failed to demonstrate that irreparable damage will result if the injunctive relief is not continued, but this Court does not believe that the record in this case would support a finding that there is a strong likelihood that plaintiffs will succeed in an appeal on the merits. Certainly, it would be the height of inconsistency for this Court to determine after a nine day trial that no irreparable damage to the aquifer will result if the project proceeds, and then enjoin the project because irreparable damage will result if the project is not halted. An injunction in the present case would, in practical effect, award to plaintiffs the identical relief already denied to them on the merits of the case.

However, the Court is of the firm opinion that the lifting of the injunction against further construction should not prejudice the position of either party, nor change the present status of this litigation to the disadvantage of any party. Therefore, it is specifically noted that any future construction, financial or contractual commitments, or progress of any kind or character on the SAR project shall be undertaken at the defendants' own peril. In other words, the denial of plaintiffs' motion for continuation or restoration of the injunction during the pendency of appeal is conditioned upon the promise that no evidence shall be offered, received or considered at any future proceeding in this cause concerning any development of the project or project to this date, whether for the purpose of

ing grounds for equitable relief or otherwise; it being the intention of the Court that any evidence which may be presented at any future hearings or proceedings herein shall be limited to the stage of development of the project as of March 14, 1972, the date of entry of the original injunction in this case.

It is therefore ORDERED that:

(1) The motion for continuation or restoration of injunction during pendency of appeal is hereby DENIED, subject to the condition hereinabove set forth.

(2) Attorneys' fees, costs, and expenses shall be awarded to the citizen plaintiffs in the total amount of \$20,000.00, to be paid by defendant, San Antonio Ranch, Ltd.

(3) The motions by plaintiffs and HUD to tax costs relating to the travel, subsistence, attendance, or other expenses of certain witnesses are DENIED.

Entered this 24th day of August, 1973 at San Antonio, Texas.



Adrian A. Spears
United States District Judge

A true copy of the original, I certify.

DAN W. BENEDICT, Clerk

By: *Frances Marley*
Deputy.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

 Nos. 72-1647/72-1648

LINDY BROS. BUILDERS, INC. OF PHILA.; DENNY DEVELOPMENT CORP.; CAMELOT, INC.

WELSH-GRANT CORP., B & S CONSTRUCTION CORP., PENN TOWER DEVELOPMENT CORP. AND MARTIN DECKER

by Aaron M. Fine, Harold E. Kohn, Dolores Korman
 GOODWIN HOMES, INC.; NOTTINGHAM CORPORATION; WARING BUILDING CORP.; KRAMER JEANETT, INC.; HARRY J. GOODWIN AND RICHARD C. GOODWIN T/A ATLANTIC COMPANY; HARRY K. MADWAY, SAM MADWAY, RALPH K. MADWAY AND PAULINE M. MARGOLIS T/A MADWAY ENGINEERS AND CONSTRUCTORS; E. J. FRANKEL ENTERPRISES, INC.; E. J. FRANKEL, ZERLINE FRANKEL, EDWARD MARGOLIS, AND LILLIAN MARGOLIS T/A WELLINGTON APARTMENTS; E. J. FRANKEL T/A E. J. FRANKEL ENTERPRISES

by Marvin Comisky and Philip C. Patterson

ROCKLEDGE HOMES, INC., RICHARD HOMES, INC., HARDY ASSOCIATES, INC., JAGER CONSTRUCTION COMPANY, EVERETT COURT APARTMENTS, INC., STURBRIDGE DEVELOPMENT COMPANY, INC., UPPER DUBLIN COMPANY, HANKIN REALTY CORPORATION, a Pennsylvania corporation, MINAMAYOR CORPORATION, a Pennsylvania corporation, MOE HENRY HANKIN ET UX, PERCH P. HANKIN ET UX, MAX A. HANKIN ET UX, SAMUEL HANKIN ET UX, BENJAMIN R. SHANKEN ET UX, Individuals and trading as HOWARD JOHNSON MOTOR LODGE OF HORSHAM AND GEORGE WASHINGTON EAST-MOTOR LODGE

by David Berger

A & L TOWERS, INC. AND OCEAN MANOR APARTMENTS, INC.,

by David Berger

BROOKVIEW APARTMENTS, INC.

by David Berger

BARLOW HOLDING COMPANY, INC.

by David Berger

TILSEN CONSTRUCTION COMPANY AND TWIN CITY BUILDING & IMPROVEMENT COMPANY

by David Berger

ALFRED P. ORLEANS; MORRIS CAPLAN; MARVIN ORLEANS AND BENJAMIN FLITTER, T/A ORLEANS CONSTRUCTION CO.; 7900 OLD YORK ROAD CORP.; ORCAP CORPORATION; KESO CORPORATION

by Marvin Comisky; Goncer M. Krestal; Philip C. Patterson

PROVIDENT CORPORATION; KINGSTON HOUSING CORPORATION; KINGSTON CONSTRUCTION CORPORATION; RAMBLEWOOD BUILDERS

by Marvin Comisky; Goncer M. Krestal; Philip C. Patterson

ORLEANS CONSTRUCTION CO. OF FLORIDA, INC.

by Marvin Comisky; Goncer M. Krestal; Philip C. Patterson

v.

AMERICAN RADIATOR & STANDARD SANITARY CORP., KOHLER CO., CRANE CO., UNIVERSAL-RUNDLE CORP., RHEEM MANUFACTURING CO., BORG-WARNER CORP., WALLACE-MURRAY CORP., BRIGGS MANUFACTURING CO., GERBER PLUMBING FIXTURES CORP., OGDEN CORP., MANSFIELD SANITARY INC., PEERLESS POTTERY, INC., KILGORE CERAMICS CORP., LAWNDALE INDUSTRIES, INC., GEORGIA SANITARY POTTERY, INC., PLUMBING FIXTURE MANUFACTURERS ASSOCIATION

3

Friendswood Development Company and Humble Oil
& Refining Company, claimants,

Appellants in No. 72-1647

The Weitz Company, Inc., Shattuck Realty, Inc., Drake
University, Westmar College, Park Homes, Inc.
(Park Realty) and Hawkeye Homes, Inc. Plaintiffs
and/or Claimants and Donald A. Wine and
C. Carleton Frederici, Attorneys of Record for
such Plaintiffs and/or Claimants,

Appellants in No. 72-1648

(D.C. Civil Action No. 41774)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued May 4, 1973

Before SEITZ, *Chief Judge*, WEIS, *Circuit Judge* and
SCALERA, *District Judge*.

Harold E. Kohn, Esquire
Aaron M. Fine, Esquire
Harold E. Kohn, P.A.

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Of Counsel:

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OPINION OF THE COURT

(Filed October 31, 1973)

SEITZ, *Chief Judge.*

These appeals concern the award of attorneys' fees following the settlement of a class action. Two members of the class here involved, Friendswood Development Company and Humble Oil and Refining Company, appeal from the award of fees to attorneys Kohn and Berger and members of their law firms. Also before us is an appeal by attorneys of the firm of Thoma, Schoenthal, Davis, Hockenberg and Wine, who were denied fees. Kohn and Berger are attorneys for Lindy Bros. Builders and the Philadelphia

Housing Authority, appellees in both appeals.¹ We will deal first with the appeal of Friendswood and Humble.

Following the indictment of plumbing fixture manufacturers and their trade association for price-fixing violations of the antitrust laws, numerous civil suits were filed on behalf of several classes of plaintiffs seeking treble damages. One such class action was filed by appellees on behalf of builders and owners shortly after the indictments were returned. The various class actions were consolidated for pretrial proceedings and transferred to the Eastern District of Pennsylvania. Several years of procedural maneuvering followed between plaintiffs and defendants, who wanted the civil suits stayed or enjoined pending resolution of the criminal actions. During the stay proceedings, in which the plaintiffs eventually prevailed, the criminal action proceeded, and on May 2, 1969, a jury verdict was returned against those defendants who had pleaded not guilty.² The schedule of depositions in the civil suit was filed in June 1969, and the taking of depositions was to have begun in the fall of 1969.

In October 1969, settlement negotiations were undertaken, primarily by attorneys Kohn and Berger and their firms. The first settlement agreement involving the builder-owner class was reached early in 1970. As a result of the settlement agreement a single fund was created to satisfy the claims of all builder-owners, those who had not filed suit ("unrepresented" claimants) as well as those who had.³ The district court gave preliminary approval to the settlement plan in May 1971, after the Supreme Court denied defendants' petition for certiorari to review this Court's

1. No question has been raised as to whether Lindy Bros. Builders and the Philadelphia Housing Authority are the proper appellees. We note that attorneys Kohn and Berger filed a petition for fees in their own name and no request for contribution was made on behalf of the named appellees. See discussion of the nature of equitable claims for attorneys' fees, *infra* [pp. 6-8].

2. Many of the defendants had pleaded *nolo contendere*, but several had pleaded not guilty, including some of the larger corporate defendants.

3. At the time the court below ruled on petitions for attorneys' fees, the fund plus interest amounted to approximately \$26 million.

affirmance of the criminal convictions. In its order preliminarily approving the settlement the district court appointed appellees as Class Representatives. The settlement was given final approval by the district court in April 1972.

At the time the district court gave final approval to the settlement, numerous attorneys petitioned for award of fees.⁴ Among these was a petition by Kohn and Berger as attorneys for the Class Representatives. Kohn and Berger had private fee agreements with the appellees and also with many other builder-owners who made claims against the fund. In their fee petition, Kohn and Berger asked for an award to be given to them directly in addition to the amounts to be received pursuant to contracts with individual claimants. For purposes of their petition, Kohn and Berger divided the class into four categories. The first category was composed of claimants who had contractual fee arrangements with Kohn and Berger. Kohn and Berger were to receive over \$800,000 from these claimants. The second category included claimants who had filed suit and whose attorneys Kohn and Berger felt had contributed to the creation of the settlement fund. Kohn and Berger were to receive no fees from these claimants and sought none. Other claimants who had joined in the suits but whose attorneys Kohn and Berger concluded had not contributed to the creation of the settlement fund comprised the third category. From these claimants, who had contracted to pay varying fees to other attorneys, Kohn and Berger sought a fee award equal to one-sixth of the claimants' share of the settlement fund.⁵ The final category was made up of builder-owners who filed claims against the fund, but who had not joined in the suit and, therefore, had not contracted with any attorney participating in the settlement negotiations or other related proceedings. Kohn and Berger asked the court to award them one-third of the amounts to be re-

4. Twelve petitions were filed; eleven were denied *in toto*.

5. At the time of the district court ruling on the fee petitions, the fees sought by Kohn and Berger from this category of claimants amounted to \$745,733.

covered by these last claimants.⁶ The petition was opposed by unrepresented claimants Friendswood Development Company and Humble Oil and Refining Company.

The district court denied Kohn and Berger's petition for fees from the third category of claimants and granted fees from the last category equal to 20% of the amount of the fund apportioned to the unrepresented claimants. Kohn and Berger have not appealed the denial of fees from claimants in category three nor the award of fees from unrepresented claimants in an amount less than requested.

Friendswood and Humble appeal from the award of fees out of the settlement apportioned to them and other unrepresented claimants.

BASIS FOR FEE AWARDS

The first contention advanced by Friendswood and Humble is that the court below lacked authority to award any fees to Kohn and Berger. We assume that appellants are correct in stating that Section 4 of the Clayton Act, 15 U.S.C. § 15 (1970), does not authorize award of attorneys' fees to a plaintiff who has settled his antitrust action, rather than pursue it to successful judgment. *Cf. Milgram v. Loew's, Inc.*, 192 F.2d 579 (3d Cir. 1951), *cert. denied*, 343 U.S. 929 (1952); *Decorative Stone Co. v. Building Trades Council*, 23 F.2d 426 (2d Cir.), *cert. denied*, 277 U.S. 594 (1928). There is, however, authority for the award of fees under the general equitable powers of the court. E.g., *Trustees v. Greenough*, 105 U.S. 527 (1882). These equitable powers may, under the equitable fund doctrine, be used to compensate individuals whose actions in commencing, pursuing or settling litigation, even if taken solely in their own name and for their own interest, benefit a class of persons not participating in the litigation. *See Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939).

6. The fees Kohn and Berger asked of unrepresented claimants totalled nearly \$2.3 million at the time of their fee petition, bringing the amount requested from the third and fourth categories to over \$3 million.

Appellants Friendswood and Humble concede that the equitable fund doctrine may provide a basis for award of attorneys' fees in the instant case. They contend, however, that the application for fees should be made by the client or clients who were parties to the action and not the attorneys who prosecuted the action or negotiated the settlement. Clearly, fees may be awarded on the attorney's petition. *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885). The thrust of appellants' contention here is more that, regardless of which person files the petition, the right to compensation is in the client rather than the attorney. We think that appellants misconceive the basis for award of attorney fees.

The award of fees under the equitable fund doctrine is analogous to an action in quantum meruit: the individual seeking compensation has, by his actions, benefited another and seeks payment for the value of the service performed. Understood in this way, there are two possible "causes of action" that may be urged as the basis for award of attorneys' fees. One of these "causes" belongs to the plaintiff who brought the underlying suit. His claim is that by instituting the suit he has performed a service benefiting other class members. The reasonable value of that service is measured by the expenses incurred by the plaintiff on behalf of the class. *Trustees v. Greenough*, *supra*, the seminal case in establishing the equitable fund doctrine, involved this type of claim for attorneys' fees. There a bondholder brought suit on behalf of himself and other bondholders to prevent the trustees of a fund that secured the bonds from committing waste. The judgment for the plaintiff set aside fraudulent conveyances and restored the fund. Relying principally on English cases requiring a trust fund to pay for the costs of its own administration, the Supreme Court affirmed the award to plaintiff of attorneys' fees and other reasonable expenses incurred in the litigation. The Court's decision made clear that the plaintiff must bear his proportionate share of expenses, *id.* at 537-38, and other class

members must likewise bear their share of the litigation's expense. *Id.* at 532-37.

The second "cause of action" for award of attorneys' fees under the equitable fund doctrine belongs to the attorney. The attorney's claim is that his conduct of the suit conferred a benefit on all the class members, that one or more class members has agreed by contract to pay for the benefit the attorney conferred upon him, and that the remaining class members should pay what the court determines to be the reasonable value of the services benefiting them. This claim was presented to the Supreme Court in *Central Railroad & Banking Co. v. Pettus*, *supra* at 120-21, three years after the *Greenough* decision. In *Pettus*, the Court upheld the award of fees directly to attorneys who had conducted a class action resulting in the establishment of a fund from which numerous creditors of the defendant railroad could be paid.⁷ The attorneys had contracted with the complainant and, during the course of the litigation, with certain other creditors for payment of contingent fees from those creditors' shares of the recovery. The Court found that the attorneys were entitled to the reasonable value of the services they rendered to the class members with whom the attorneys had not contracted. *Id.* at 127.

We recognize the close relation between the equitable claims for attorneys' fees that clients and attorneys, respectively, may advance. An attorney's claim for the value of his services to unrepresented class members may be subsumed, fully or partially, in the "expenses" claim of the attorney's client who had paid more than his share of the value of the attorney's services to the class. We need not, however, decide now the manner in which courts should treat such overlapping claims by attorney and client. In this case, the only claims made were by attorneys. In passing upon the sums which represent the value of attorneys' services to unrepresented claimants, we do not

7. The "fund" in *Pettus* was a lien on the railroad's property.

intimate any view concerning the ability of these attorneys' private clients to require application against the attorneys' charges to them of all or part of the fees paid by unrepresented claimants.⁸ We reject appellants' contention that there is no basis for the award of fees directly to the attorneys absent a finding that such award is necessitated by their clients' interests.

STANDARDS GOVERNING FEE AWARDS

In awarding attorneys' fees, the district judge is empowered to exercise his informed discretion, and any successful challenge to his determination must show that the judge abused that discretion.⁹ *Tranberg v. Tranberg*, 456 F.2d 173, 175 (3d Cir. 1972). Appellants contend that, by failing to observe appropriate standards and procedures, the judge below did abuse his discretion in awarding fees to Kohn and Berger.¹⁰ Friendswood and Humble are correct in arguing that failure to adhere to proper standards and to follow appropriate procedures would constitute abuse of the district court's discretion to award attorneys' fees. We proceed, therefore, to an examination of appellants' claim that the standards applied below in awarding fees to Kohn and Berger were improper.

The district judge listed four factors that he considered in his award of fees to Kohn and Berger. These were: the percentage of a claimant's recovery awarded as attorneys' fees in other cases, the amount of the recovery from which fees were being awarded, the amount the at-

8. Cf. *Cherner v. Transitron Elec. Corp.*, 221 F. Supp. 55, 62-63 (D. Mass. 1963).

9. Appellants-attorneys of the Thoma group have argued that we should apply a broader standard of review here because the district judge was not sitting in the initial pretrial proceedings. We reject this contention. Although the district judge should be particularly diligent in setting forth specifically the facts that support his conclusion where he did not sit throughout the entire proceedings, the standard of review to be applied by the appellate court remains the abuse of discretion standard.

10. Appellants also claim that even if the district judge did observe the proper standards and procedures, he abused his discretion in awarding an excessive fee to Kohn and Berger. In light of our conclusions as to the appropriate standards and procedures, we do not find it necessary to decide this issue.

torneys received from their clients under private agreements, and the time spent by Kohn and Berger “in connection with this litigation.” 341 F. Supp. 1077, 1089-90 (E.D. Pa. 1972). The court below elaborated on these considerations by noting that the percentage of a recovery awarded as attorneys’ fees should decline as the amount of the recovery increased and that the time spent by the attorneys was not so important here as in most cases. The judge did not indicate why time was less important here, nor did he explain what use was made of his knowledge of Kohn and Berger’s private fee agreements.

The mere listing of four factors for consideration by the court makes meaningful review difficult and gives little guidance to attorneys and claimants. In detailing the standards that should guide the award of fees to attorneys successfully concluding class suits, by judgment or settlement, we must start from the purpose of the award: to compensate the attorney for the reasonable value of services benefiting the unrepresented claimant. Before the value of the attorney’s services can be determined, the district court must ascertain just what were those services. To this end the first inquiry of the court should be into the hours spent by the attorneys—how many hours were spent in what manner by which attorneys. It is not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted nor the specific attainments of each attorney. But without some fairly definite information as to the hours devoted to various general activities, *e.g.*, pretrial discovery, settlement negotiations, and the hours spent by various classes of attorneys, *e.g.*, senior partners, junior partners, associates, the court cannot know the nature of the services for which compensation is sought.

Ascertaining, within appropriately specific categories, the time spent is only the first step the district court should follow in determining the proper attorneys’ fees to be awarded. In light of the comments of the judge below,

however, we wish to make clear its importance. In this case, partly as a result of the procedures employed by the district court, the only information furnished to the district judge regarding the time spent by Kohn, Berger and their associates was that they had spent “in excess of 6,000 hours in connection with this litigation.” 341 F. Supp. at 1090. This information was insufficient to support the award of fees to Kohn and Berger.

After determining, as above, the services performed by the attorneys, the district court must attempt to value those services. In some cases it may be possible to identify the hours spent as having benefited the individual client, the unrepresented claimants, or both. Where this is feasible, the district judge may want to assess directly the value of the attorneys’ services to the unrepresented claimants without first determining the overall value of the attorneys’ services in the case. Here, it would seem artificial to segregate the attorneys’ efforts into categories as aiding clients, unrepresented claimants or the entire class. A single fund was created after negotiations on behalf of all claimants. Absent some contrary showing, we presume that all the attorneys’ time contributed to the recoveries of each claimant. Where all of an attorney’s services benefit the whole class, it seems simplest to determine the value of his services to the class and then to assess the extent to which the unrepresented claimants benefited from these services as compared with the rest of the class.

The value of an attorney’s time generally is reflected in his normal billing rate. A logical beginning in valuing an attorney’s services is to fix a reasonable hourly rate for his time—taking account of the attorney’s legal reputation and status (partner, associate). Where several attorneys file a joint petition for fees, the court may find it necessary to use several different rates for the different attorneys. Similarly, the court may find that the reasonable rate of compensation differs for different activities.

Finding the reasonable hourly rate for each attorney does not end the court's inquiry into the value of the attorney's services. The court cannot properly fix attorneys' fees merely by multiplying the hourly rate for each attorney times the number of hours he worked on the case. Before discussing the other factors to be considered in fixing fees, we stress, however, the importance of deciding, in each case, the amount to which attorneys would be entitled on the basis of an hourly rate of compensation applied to the hours worked. This figure provides the only reasonably objective basis for valuing an attorney's services. As Judge Wyzanski observed a decade ago in a case similar to this:

No one expects a lawyer to give his services at bargain rates in a civil matter on behalf of a client who is not impecunious. No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success. Nor, particularly in complicated cases producing large recoveries, is it just to make a fee depend solely on the reasonable amount of time expended. Yet unless time spent and skill displayed be used as a constant check on applications for fees there is a grave danger that the bar and bench will be brought into disrepute, and that there will be prejudice to those whose substantive interests are at stake and who are unrepresented except by the very lawyers who are seeking compensation. *Cherner v. Transitron Electronic Corp.*, 221 F. Supp. 55, 61 (D. Mass. 1963).

While the amount thus found to constitute reasonable compensation should be the lodestar of the court's fee determination, there are at least two other factors that must be taken into account in computing the value of attorneys' services. The first of these is the contingent nature of success; this factor is of special significance where, as here, the attorney has no private agreement that guarantees pay-

ment even if no recovery is obtained.¹¹ In assessing the extent to which the attorneys' compensation should be increased to reflect the unlikelihood of success, the district court should consider any information that may help to establish the probability of success. The most important such information in a civil antitrust suit may be the progress of any criminal action brought against the defendants.¹² Here, the United States had obtained indictments against all the defendants before the civil suits were filed; the defendants who pleaded not guilty had been convicted before serious settlement negotiations were begun; and those convictions were affirmed before the court gave final approval to the settlement. The court may find that the contingency was so slight or the amount found to constitute reasonable compensation for the hours worked was so large a proportion of the total recovery that an increased allowance for the contingent nature of the fee would be minimal.

The second additional factor the district court must consider is the extent, if any, to which the quality of an attorney's work mandates increasing or decreasing the amount to which the court has found the attorney reasonably entitled. In evaluating the quality of an attorney's work in a case, the district court should consider the complexity and novelty of the issues presented, the quality of the work that the judge has been able to observe, and the amount of the recovery obtained. This last factor may be the only means by which the quality of an attorney's performance can be judged where a suit is settled before any significant in-court proceedings. In making allowance for the quality of work, the court must keep in mind that the

11. All private agreements here were for contingent fees.

12. The threshold issue in antitrust cases is the defendant's violation of the antitrust laws. If the defendant in a criminal antitrust action is convicted after a plea of not guilty, the criminal conviction is *prima facie* evidence of violation of the antitrust laws. 15 U.S.C. §16 (1970). We recognize that convictions following pleas of *nolo contendere* are not entitled to the same evidentiary position as convictions following not guilty pleas and that even where violation of the antitrust laws is established, civil plaintiffs must prove that they were injured by the violation.

attorney will receive an otherwise reasonable compensation for his time under the figure arrived at from the hourly rate. Any increase or decrease in fees to adjust for the quality of work is designed to take account of an unusual degree of skill, be it unusually poor or unusually good. If the district judge determines that particular work was of atypical quality, he should, in increasing or decreasing the fee, be cognizant of the amount of time devoted to that given activity. Further, in increasing or decreasing an attorney's compensation, the district judge should set forth as specifically as possible the facts that support his conclusion, particularly where, as in this case, the judge determining the fees to be awarded did not sit in the case throughout the entire proceeding. The value to be placed on these additional factors will, of course, vary from case to case. Often, however, their value will bear a reasonable relationship to the aggregate hourly compensation.

After determining the total reasonable value of an attorney's services in securing recovery of a fund for the class, the district court must determine what portion of the amount arrived at should be paid by the unrepresented claimants. Absent extraordinary circumstances, the unrepresented claimants should pay for the attorneys' services in proportion to their benefit from them—that is, the unrepresented claimants should pay a percentage of the reasonable value of the attorneys' services to the class equal to their percentage of the class' recovery. We reiterate that we are not here called upon to decide whether his private clients can require that all or part of the fees recovered by the attorney be applied against the fees charged those clients.

PROCEDURE—REQUIREMENT OF A HEARING

Friendswood and Humble contend that the district judge erred in failing to grant the requested evidentiary hearing before awarding fees. Had the district court been guided by the proper standards for setting attorneys' fees, the necessity of an evidentiary hearing would have been

apparent. In determining the amount of time spent by various attorneys on different activities, the standard billing rate appropriate for each attorney, the extent of the contingency, and the degree to which an attorney's efforts advanced the interests of claimants from whom he seeks fees, the district judge must possess a great deal of information not presented below. Much of the evidence on which the judge will base his award or denial of fees may be disputed; the evidence presented by an attorney petitioning for fees may be incomplete. The denial of fees obviously harms the petitioning attorney. Just as obviously, award of attorneys' fees harms the unrepresented claimant by reducing his net recovery. These opposing interests should be afforded a hearing to provide an evidentiary basis for resolution of disputed factual matters and to allow the parties to supplement possibly incomplete statements of opposing parties.

Courts have noted that expert testimony is not necessary to establish the value of a lawyer's services and have, on that ground, sanctioned the award of attorneys' fees on the basis of affidavits without a hearing. *E.g.*, *Tranberg v. Tranberg*, *supra* at 175. A judge is presumed knowledgeable as to the fees charged by attorneys in general and as to the quality of legal work presented to him by particular attorneys; these presumptions obviate the need for expert testimony such as might establish the value of services rendered by doctors or engineers. Although expert opinion evidence is not required in awarding attorneys' fees, where the facts to be weighed in light of the judge's expertise are disputed, an evidentiary hearing is required. *See Thomas v. Honeybrook Mines, Inc.*, 428 F.2d 981, 988-89 (3d Cir. 1970), *cert. denied*, 401 U.S. 911 (1971). The Supreme Court endorsed the view taken here in *Perkins v. Standard Oil Co.*, 399 U.S. 222 (1970), a case involving the award of attorneys' fees under Section 4 of the Clayton Act. The Court stated that "[t]he amount of the award for such services should, as a general rule,

be fixed in the first instance by the District Court, after hearing evidence as to the extent and nature of the services rendered.” *Id.* at 223.

We conclude that the failure of the district court to hold an evidentiary hearing and its failure to follow proper standards in awarding fees to attorneys Kohn and Berger were inconsistent with the sound exercise of discretion.

THE THOMA PETITION

Of the attorneys whose petitions for fees were denied, only one group has appealed. These attorneys are members of the firm of Thoma, Schoenthal, Davis, Hockenberg and Wine (hereinafter “Thoma”). In denying the Thoma petition, which asked for \$17,646, the district court did not hold an evidentiary hearing nor was it guided by the standards set forth above. We hold that the denial of the Thoma petition was inconsistent with the sound exercise of discretion.

The orders granting attorneys’ fees to Kohn and Berger and denying fees to the Thoma attorneys are vacated and the matters remanded to the district court for further proceedings consistent with this opinion.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals
for the Third Circuit.*

Reimbursement of Counsel Fees and the Great Society[†]

In sorrow and in anger—and in hope

*Albert A. Ehrenzweig**

I

SORROW: THE LITTLE MAN'S PLIGHT

WHEN I CAME to this country twenty-seven years ago, I was penniless, did not speak English, had to support wife, children and parents, and was unable to use anything that I had learned and done as a judge and law teacher in my first life. And yet I was permitted and encouraged to rejoin my own profession for a life in freedom and dignity. I knew, I knew deep in my heart, that there was no other country in the world in which this could have happened.

Compared to this knowledge, it meant little that an American moving firm had cheated us out of our last belongings; and it was only a fleeting disappointment when I found out that I had no recourse in the courts of law. I was, of course, directed to a fine lawyer. "Sure," he said, "you have an airtight claim, and I shall take your case, but you will understand, I must have one hundred dollars as a retainer." I did *not* understand. Would he not get his fees from the defendant, as he would anywhere else in the world? I did not have the hundred dollars, and even if I had won, I would not have been made whole for I had to pay my own lawyer. Of course I did not sue. The little man had lost. A fleeting disappointment, true. But I then swore to myself that I would not forget the little man if I should ever cease to be one.

Twenty-seven years have gone by. But only now do I feel that I can, in good taste and good faith, take on the fight and attack an institution which, erroneously, is held in awe by the American legal profession as a sacred common law heritage: the power and, indeed, the right of the losing party in a civil suit to inflict on the winner not only the misery but

[†] Much of the following material appeared first in my paper, *Shall Counsel Fees Be Allowed?*, 26 CAL. S. B.J. 107 (1951). See also Potter & Cooper, *Attorney's Fees*, 14 TRV. B.J. 579 (1951), borrowing generously from that paper without citation. A recent article, Stoebe, *Counsel Fees Included in Costs: A Logical Development*, 38 U. COLO. L. REV. 202 (1966), takes essentially the position advocated in this article, and includes a draft statute.

* Dr. Jur., 1928, Vienna, Austria; J.D., 1941, University of Chicago; LL.M., 1942, J.S.D., 1952, Columbia University. Walter Perry Johnson, Professor of Law, University of California, Berkeley; *Honorary professor* of Conflict of Laws, University of Vienna.

also the expense of enforcing his just claim. For I am convinced that my plea for the abolition of that power, made in sorrow and in anger and in hope, has an essential function in the War on Poverty to which every citizen wherever born, every lawyer wherever bred, has the right and duty to contribute.

Reform of criminal procedure has become the central problem of the law reform which is to serve the Great Society. It is of course crucially important for us to protect everybody as well as we can, against the hazards of criminal justice. But most of these hazards will forever remain. For mankind's helplessness in the face of crime and criminals, the persistence of mankind's retributive instincts warring with its curative reasoning and ideals will forever permit only alleviation of this innate tragedy.¹ On the other hand, that other phase of our administration of justice, civil procedure, being infinitely less burdened by psychological trauma and enigma, has proved capable of true reform elsewhere, and that reform is long overdue in this country. Strangely, terribly, intolerably, these United States, this citadel of democracy, which has taken it on itself to play the decisive role in building the Rule of Law throughout the world, has forgotten the little man in his struggle for civil justice.

This fact is incredible to those who, though subjects of foreign dictators, enjoy a truly democratic civil procedure. But lack of such a procedure in this country is, of course, not a sinister product of "capitalism." Rather it is the result of historical accident. That it has, nevertheless prevailed to this day, is due no doubt to the multifarious split in the laws of the several states, which has prevented them from partaking in the progress of civil procedure in other countries, socialist and capitalist alike. It will remain for a future generation of scholars and lawyers with greater leisure and peace of mind, without prejudice and with much self-denial, to approach this general problem. What I can do, what I feel I must do at this time, is to make an urgent plea for the immediate reform of *one* central facet of our civil procedure which, separable from the latter's body, can and must be destroyed as a pernicious historical relic—unknown in the rest of the world—the rule, I repeat, that the winning party in a law suit (with few and unimportant exceptions) cannot recover his counsel fees from the loser.

True, commercial civil litigation, with its finely honed tools of adversary proceedings between lawyers, has been developed in this country to a perfection not easily equalled elsewhere. And there is scant reason for redistributing the cost of such litigation among the equal partners. True, also, that that travesty of the little man's justice, the personal injury

¹ See Ehrenzweig, *A Psychoanalysis of the Insanity Plea*, 73 YALE L.J. 425 (1964).

suit, with its gamble, delay and expense, will have to await fundamental substantive reform which will replace this suit by new tools for the distribution of losses inevitably caused by modern mechanical enterprise.² And until this reform can be achieved against the continuing resistance of the "industries" of the "plaintiffs' bar" and of insurance, the contingent fee, that legitimate sibling of criminal champerty, will have to remain with us as an incurable symptom of an uncured disease. But the little man in his every day dealings with his contracts, his property,³ his family,⁴ and administrative agencies⁵ can and must be helped at this time, not by the business of neighborhood referral or the charity of legal aid, but by a reform of our law of counsel fees.

Just a trifle, a little cog in the great wheel of justice? No, a festering cancer in the body of our law without whose excision our society will not be great. Big words, to be sure. I shall try to justify them first in angry terms of personal experience and then in terms of the teacher and lawyer, thus adding hope to sorrow and to anger.

II

ANGER: UNREASON AND HYPOCRISY

As early as forty years ago, the Massachusetts Judicial Council pleaded for reform,⁶ asking: "On what principle of justice can a plaintiff wrongfully run down on a public highway recover his doctor's bill but not his lawyer's bill."⁷ As long as thirty-eight years ago, Sir Arthur Goodhart urged a comparative and functional study of the problem.⁸ Over and again public attention has been drawn to the intolerable consequences of our rule. Yet the American bar has remained satisfied with slogans calling for making its services available to the "poor" through patchwork measures such as referral services and legal aid.⁹ Group services may be the next

² See EHRENZWEIG, *NEGLIGENCE WITHOUT FAULT* (1951); EHRENZWEIG, "FULL AID" INSURANCE (1954).

³ See, e.g., Cohen, *Law, Lawyers, and Property*, 43 TEX. L. REV. 1072, 1079 (1965).

⁴ See, e.g., Carlin & Howard, *Legal Representation and Class Justice*, 12 U.C.L.A.L. REV. 381, 413 (1965).

⁵ See, e.g., Sparer, *The Role of the Welfare Client's Lawyer*, 12 U.C.L.A.L. REV. 361 (1965).

⁶ See Judicial Council of Massachusetts, *First Report*, 11 MASS. L.Q. 1, 63-64 (1925).

⁷ *Id.* at 64.

⁸ Goodhart, *Costs*, 38 YALE L.J. 849 (1928).

⁹ See the much-praised report of the A.B.A. Committee on Legal Aid and Indigent Defendants, 51 A.B.A.J. 398 (1965). See also, e.g., Westwood, *Legal Aid on the March in the Nation's Capital*, 51 A.B.A.J. 325 (1965). The problem is not limited to the "poor." See Note, *Providing Legal Services for the Middle Class in Civil Matters: The Problem, the Duty, and a Solution*, 26 U. PITT. L. REV. 811 (1965). Compare Fritz, *How Lawyers Can Serve the Poor at Profit*, 52 A.B.A.J. 448 (1966).

reluctant concession.¹⁰ But even the War on Poverty stops short of the fundamental issue.¹¹ And everyone raising it, will run into a stone wall.

I have long had to harden myself against the argument of friends and colleagues that my alien scheme would offend the American sense of fairness. Many, many times I have made my defense as I shall restate it presently. Only once I tried to reach a greater audience. I spent several weeks in tedious research to show how the rest of the world felt about our rule and completed a paper with a great deal of documentation. It remained unnoticed and unanswered in the "Forum" section of the bar journal to which I submitted it.¹² I did not give up. In 1952, as chairman of a committee of the American Bar Association, I obtained the unanimous consent of my committee to a summary of my research and to a recommendation that a comparative study of the problem be undertaken¹³—only to have our report pigeonholed for almost ten years. To be sure, in 1963 a courageous successor, Mr. Benjamin Busch, encouraged by the then chairman and vice-chairman of the Section, not only sought to bring the report to renewed attention, but actually obtained comparative studies for four countries.¹⁴ But here the matter rests and will rest unless and until those concerned with the War on Poverty take on the fight.

Why the stone wall? Why must we fight so bitterly for something that is a matter of course in the rest of the world? Is it not obvious that the little man can fight for his right only if he can hope that he and his lawyer will be made whole if he wins? As an American lawyer I know that the little man's only refuge, the small claims court, is unavailable in innumerable communities; and that where it exists, it is prevailingly a collection

¹⁰ See, e.g., Tucker, *Brotherhood of Railroad Trainmen v. Virginia: A Call to Realism in Legal Ethics*, 14 J. PUB. L. 3 (1965); Schwartz, *Foreword: Group Legal Services in Perspective*, 12 U.C.L.A.L. REV. 279 (1965).

¹¹ See Shriver, *The OEO [Office of Economic Opportunity] and Legal Services*, 15 A.B.A.J. 1064 (1965).

¹² Ehrenzweig, *supra* note †.

¹³ 1953 PROCEEDINGS OF SECTION OF INTERNATIONAL AND COMPARATIVE LAW, A.B.A., 125 (1953). See also Avila, *Shall Counsel Fees Be Allowed*, 13 CAL. S. B.J. 42 (1942); Geller, *Unreasonable Refusal to Settle and Calendar Congestion—Suggested Remedy*, 1962 PROCEEDINGS OF SECTION OF INTERNATIONAL AND COMPARATIVE LAW, A.B.A. 134 (1963); Hornstein, *Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards*, 69 HARV. L. REV. 658 (1956); Kuenzel, *The Attorney's Fee: Why Not A Cost Of Litigation*, 49 IOWA L. REV. 75 (1963).

¹⁴ Baeck, *Imposition of Fees of Attorney of Prevailing Party Upon the Losing Party Under the Laws of Austria*, 1962 PROCEEDINGS OF SECTION OF INTERNATIONAL AND COMPARATIVE LAW, A.B.A. 119 (1963); Baeck, *Imposition of Legal Fees and Disbursements of Prevailing Party Upon the Losing Party—Under the Laws of Switzerland*, *id.* at 124; Dietz, *Payment of Court Costs by the Losing Party Under the Laws of Hungary*, *id.* at 131; Freed, *Payment of Court Costs by Losing Party in France*, *id.* at 126; Schima, *The Treatment of Costs and Fees of Procedure in the Austrian Law*, *id.* at 121.

agency, and presents otherwise the horrifying spectacle of a court without law, abandoned by the legal profession which, almost everywhere, is excluded from its precincts.¹⁵ And as an American citizen I know that all the law now offers the little man, outside that second-rate court at some places and at some times, is charity. Legal aid, rather than legal right. If access to the court is said to be an inalienable right in the most rigid dictatorship, money then is the way to justice in the world's greatest democracy. But not only the little man is in jeopardy, the legal profession is hurting itself immeasurably by its doting on what it wrongly believes to be a hallowed tradition. From my experience as an Austrian judge I know that these hundreds of thousands of honest claims which now are either contemptuously disposed of by "law-less" magistrates as not worthy of the law's and the lawyer's attention, or condescendingly "aided" by the generosity of the profession and its apprentices, or simply suppressed by lack of machinery, all those hundreds of thousands of honest claims, if made recoverable by a reform of our system of counsel fees, would become the daily bread of a new proud profession of "little lawyers" serving the little man—as they do everywhere else in the world. And yet—the stone wall. Why?

How often have I heard my colleagues' chiding: "You simply have not grasped the American sense of fairness. It is bad enough to see one lose who in justice should have prevailed. To make him pay the winner's counsel would add injustice to injustice, would mean stepping on one who is down, and it would make honest men unwilling to go to court, be it as plaintiffs or as defendants."¹⁶ But is it not obvious that this argument implies the cynical, and most certainly incorrect, belief that judges and juries are more often wrong than right? Indeed, as Arthur Goodhart has said pointedly in answer to this argument:¹⁷ "If New Jersey justice is so much a matter of luck, it hardly seems worthwhile to have courts and lawyers; it would be cheaper, and certainly less dilatory, to spin a coin."¹⁸

¹⁵ See Comment, 52 CALIF. L. REV. 876 (1964), and for a bibliography, LOUISELL & HAZARD, CASES ON PLEADING AND PROCEDURE 111 (1962).

¹⁶ This reasoning is restated in *Report of Committee on Comparative Procedure and Practice*, 1962 PROCEEDINGS OF SECTION OF INTERNATIONAL AND COMPARATIVE LAW, A.B.A. 117, 118 (1963), as the "sincere . . . opinion of many practitioners" who maintain "that the right to sue without deterrence [*sic*] by the specter of the possibility of paying an adversary's legal fees is part of our democratic tradition and a bulwark of equality that reduces the differences in part between the wealthy and the poor and permits the less affluent to press for the redress of wrongs." See also a similar pseudo-historical statement in *Conte v. Flota Mercante del Estado*, 277 F.2d 664, 672 (2d Cir. 1960), relying on Goodhart, *supra* note 8, at 872-77. And see the most peculiar argument in JUDICIAL COUNCIL OF CALIFORNIA, 18TH BIENNIAL REPORT 65 (1961).

¹⁷ See Satterthwaite, *Increasing Costs to be Paid by the Losing Party*, 46 N.J.L.J. 133 (1923).

¹⁸ Goodhart, *supra* note 8, at 877. See also Goodhart, *Legal Costs As a Subject for Comparative Law*, 4 INT'L & COMP. L. BULL. 13 (1960).

Let us concede for the sake of argument that many court decisions should in justice have gone the other way, and that in those cases, if counsel fees were allowed, losing parties would be treated even more unjustly than they are now. But how can we ignore the fact that at the same time we would prevent that great majority of plaintiffs and defendants, who justly lose their cases, from getting away, as they do now, with unjustly burdening their prevailing opponents with the heavy expense of counsel fees? Only if our initial assumption is reversed and we must concede that litigants who should win, more often lose than win their cases, would our argument be incorrect.

Now, it could be argued, of course, that allowance to the victorious party of his counsel fees might, besides inflicting additional harm on losing litigants with meritorious claims, deter an additional number of such claims from even reaching the court—a result particularly undesirable in the ordinary, wholly unpredictable automobile accident case. But this argument, in the first place, is psychologically doubtful since, in view of the very unpredictability of jury assessments, additional uncertainty is unlikely to influence the parties' decision. And secondly, juries in making their assessments now probably quite generally take into account the plaintiff's counsel fees and would be likely to reduce their verdicts correspondingly if instructed as to plaintiff's right to recover his fees in addition to the sum assessed. On the other hand, the fact that allowance of counsel fees might deter a few skeptical defendants who fear that court or jury might fail to recognize their just defenses, would seem less objectionable than the present system under which many more, though confident that the law would properly decide in their favor, now refuse to defend suits in which they would ultimately, though relieved of paying an unjust claim, have to spend counsel fees far exceeding that claim. For similar reasons it cannot be argued that allowance of counsel fees would encourage frivolous plaintiffs who would no longer have to contemplate a possible consumption by counsel fees of their expected spoils. It seems likely that a greater number of such frivolous plaintiffs now only risking their own expense, would properly be deterred by the additional risk of having to pay their opponents' counsel fees. On the other hand, the prospect of recovery of counsel fees on meritorious claims would probably greatly increase the number of clients seeking lawyers' assistance. Be this as it may in the no-man's land of personal injury claims, these arguments are fully conclusive, I believe, for the little man's other claims which alone are the subject of my plea.

Suggestions aiming at a reform of the present law find strong support in the fact, stressed earlier, that this country now is probably alone in failing to allow counsel fees to the victorious litigant. True, the manner

in which this allowance is made in other countries varies widely. In England, Canada, and other parts of the Commonwealth it is subject to the discretion of the court.¹⁹ Elsewhere, statutory tariffs govern the assessment.²⁰ True also that under many systems parties will often choose separately to compensate their attorneys at a rate higher than that conceded by the statute or by the court. But most everywhere else in the world the chance of recovering counsel fees, however modest, from the losing opponent, is a strong inducement for the lawyer to take on a meritorious case without regard to his client's affluence and thus greatly to increase the number of those served by the legal profession.

Well accepted as allowance of counsel fees may be in other countries, we could not contemplate its adoption, however, without having first assured ourselves that the present American law of fees is not justifiable or even indispensable as the product of legal institutions or attitudes peculiar to this country. But I believe that I have won my case if I can prove that what continues to parade as a token of the American sense of fairness, is nothing but an historical accident. Once this is understood and accepted, we may cease to talk in sorrow and in anger—and have new hope for the future.

III

HOPE: HISTORY AND GOOD WILL

England, since time immemorial, has permitted the parties to recover their counsel fees from their losing opponents.²¹ It seems beyond doubt that this principle was adopted in this country with the reception of English law. The Revised Statutes of New York of 1829 contain express provisions to this effect.²² A Report of the Commissioners on Practice and Pleading of September 25, 1847, took it for granted that "the losing party, ought . . . as a general rule, to pay the expense of the litigation. He has caused a loss to his adversary unjustly, and should indemnify him for it. The debtor who refuses to pay, ought to make the creditor whole."²³ I have tried elsewhere to trace the legislative history leading to our present allegedly ancient rule,²⁴ and have submitted on the basis of that study that the rule is not founded on some age-old principle of the common law or a peculiar psychology of the American people; but that it is the result of a more or less accidental statutory history. Indeed, there are good reasons for assuming that what is now so often represented as a noble postulate

¹⁹ The system is described in Goodhart, *supra* note 4, at 854-55.

²⁰ See authorities cited in note 14 *supra*.

²¹ Goodhart, *supra* note 8, at 851-54.

²² 2 N.Y. Rev. Stat., pt. III, ch. 10, § 9 (plaintiff), § 22 (defendant) (1829).

²³ COMMISSIONERS ON PRACTICE AND PROCEDURE, FIRST REPORT 206 (1848).

²⁴ Ehrenzweig, *supra* note †.

for restraint of the winner in a chance contest, is actually due to the simple fact that the New York legislature in 1848, in attempting to perpetuate what it considered a sound legal rule of recovery of attorneys' fees by the prevailing party, made the fatal mistake of fixing the amount recoverable in dollars and cents rather than in percentages of the amount recovered or claimed. It was this mistake probably that caused lawyers and courts, when rising living costs began to obscure the real purpose of the statutory amounts of "costs," gradually to forget the meaning of those amounts. And it was this process of gradual forgetting rather than a deep-seated moral argument that has apparently caused the abolition of the prevailing party's right to the recovery of his counsel fees.

Once we have recognized this irrefutable fact, and once we share the opinion, supported by much domestic and foreign authority as well as common sense, that the present system denying counsel fees to the prevailing party is a serious threat to our administration of justice, the question of remedy becomes our main concern.

None of the existing schemes constitutes a wholly acceptable solution. The English system, partly adopted in this country by courts of equity²⁵ and generally in Alaska²⁶ and Nevada,²⁷ has been found wanting in view of its undesirable latitude of judicial discretion. Allowance of counsel fees in cases of bad faith, as practiced in Georgia,²⁸ though less uncertain, does not protect the prevailing party as such. And general recovery of fixed amounts, originally the law of the land, has been abandoned everywhere under the pressure of the devaluation of currency, while uniform percentages with or without maximum limit, as applied in San Francisco from 1866 to 1905²⁹ and, within narrow limits, in New York today,³⁰ have proved too rigid.

What the New York code commissioners suggested in 1848 still holds true: Counsel fees, to be justly recoverable by the prevailing party must be "graduated in part by the necessary labor performed, and in part by the amount in controversy."³¹ Nothing else will do, neither the California rule applicable to suits for wages below three hundred dollars and providing

²⁵ See, e.g., *Williams v. MacDougall*, 39 Cal. 80, 85 (1870). But see *Miller v. Kehoe*, 107 Cal. 340, 344, 40 Pac. 485, 486 (1895). See generally *Macri v. Bremerton*, 8 Wash. 2d 93, 111 P.2d 612 (1941).

²⁶ ALASKA STATS. ANN. § 9.60.010 (1962). The provision lodges discretion in the court to grant or withhold attorney fees as an item of costs. It is derived from Alaska Comp. Laws Ann. § 55-11-51, 52, 55 (1948), repealed, Alaska Stats. 1962, ch. 101. See *United States v. Breeden*, 110 F. Supp. 713 (D. Alaska 1953).

²⁷ NEV. REV. STAT. § 18.010 (1963).

²⁸ GA. CODE ANN. § 20-1404 (1965).

²⁹ Cal. Stats. 1865-66, ch. 91, § 6, repealed, Cal. Stats. 1905, ch. 331.

³⁰ N.Y. CIV. PRAC. LAWS & RULES § 8303 (1963, Supp. 1965).

³¹ COMMISSIONERS ON PRACTICE AND PROCEDURE, *op. cit. supra* note 23, at 207.

for a straight twenty per cent fee without regard to the services performed,³² nor the fixed sums³³ of the California Practice Act of 1851 which, though taking account of those services, had no relation to the amount in controversy.³⁴ But why not combine the two principles in one scheme of *percentage compensation for each service performed*? Would not the most natural solution be to restore the schedule of services under the Practice Act of 1851 and to substitute for the fixed amounts of that schedule percentages preserving their mutual relation? Further to follow precedent, the total of recovery should approximate the twenty per cent of the present rule applicable to suits for wages. In addition, it may be wise to grant the court limited discretion in penalizing parties suing or defending in obvious bad faith or taking procedural steps not reasonably necessary, and increasing the total of recovery in cases of extraordinary difficulty on the pattern of section 8303 of the New York Civil Practice Laws and Rules.³⁵ Both principles and details of such a plan would, of course, have to be subjected to much discussion among those who by professional experience and familiarity with local conditions are alone equipped to pass final judgment.

Is there hope? The Great Society is waiting.

³² CAL. CODE CIV. PROC. § 1031.

³³ "Perhaps if the New York code of 1829, instead of providing for a fixed fee in every case, had allowed the successful party a reasonable counsel fee depending on the nature of the litigation, the [U.S.] system would have developed along the lines of the present English one." Goodhart, *supra* note 8, at 874. That the California legislature abolished the allowance in San Francisco of counsel fees to the prevailing party is probably due to a similar mistake of legislative technique, *i.e.*, the establishment in 1866 of a maximum fixed amount of one hundred dollars. Cal. Stats. 1865-66, ch. 91, § 60, repealed, Cal. Stats. 1905, ch. 331.

³⁴ Calif. Civ. Prac. Act §§ 494-514, Cal. Stats. 1851, ch. 5. The costs provisions were amended in a few minor details by Cal. Stats. 1853, ch. 178, §§ 8-11. Section 502 of the Civil Practice Act of 1851 did provide for a percentage recovery in certain actions, but the percentage was low (five per cent on the first one thousand dollars, two per cent thereafter) and allowances could in no event exceed five hundred dollars.

³⁵ N.Y. CIV. PRAC. LAWS & RULES § 8303 (1963, Supp. 1965).

The Allocation of Attorney's Fees After *Mills v. Electric Auto-Lite Co.*

The legal system of the United States has traditionally refused to award attorney's fees to the successful litigant.¹ Defenders of the rule emphasize that it encourages the resolution of controversies through the courts, enhances predictability, and promotes the security and confidence of the prospective litigant.² Recently, however, the rule has been the focus of substantial criticism.³ Commentators point out that while the citizen need not pay his opponent's fees, neither can he recover the cost of his own lawyer. As a result, soaring legal fees have vitiated the impact of lowered financial risk and have effectively excluded the poor⁴ (and increasingly the middle class)⁵ from active participation in the legal process.

¹ The United States may be unique among the nations of the world in its failure to grant legal fees to the successful party. Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792, 793 (1966).

² For classic discussions of the pros and cons of the American fee rule compare McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 MINN. L. REV. 619 (1931), with Goodhart, *Costs*, 38 YALE L.J. 849 (1929), and Note, *Distribution of Legal Expenses Among Litigants*, 49 YALE L.J. 699 (1940).

³ Four major articles in the 1960's, all critical of the fee system and all cited by the *Mills* court, are Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?*, 49 IOWA L. REV. 75, 78 (1963); Stoebuck, *Counsel Fees Included in Costs: A Logical Development*, 38 COLO. L. REV. 202 (1966); Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 VAND. L. REV. 1216 (1967); and Ehrenzweig, *supra* note 1.

⁴ Carlin & Howard, *Legal Representation and Class Justice*, 12 U.C.L.A.L. REV. 381 (1964). One of the distinctive anomalies at the core of the American fee system is that while it is responsible for the exclusion of the poor from the legal process, it is defended as a protection for the indigent who might otherwise be "unjustly discouraged from instituting actions to vindicate their rights." *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967); accord, *Farmer v. Arabian Am. Oil Co.*, 379 U.S. 227, 237 (1964) (Goldberg, J., concurring). The traditional argument answers the question: What would be the effect on the poor of increased litigating risks? Whatever the merits of the answer, the question is wrong because it implies the reality of a free access system which does not exist in fact. Better questions might be: Would more meritorious claims by poor citizens be excluded by the risks of fee shifting than are now excluded by their inability to retain legal counsel? Should the operative criteria for exclusion be economic power or the individual's own judgment as to the merits of his case?

⁵ Comment, *Providing Legal Services for the Middle Class in Civil Matters: The Problem, the Duty, and a Solution*, 26 U. PITT. L. REV. 811, 814 (1965). The resulting situation in which practical legal rights have become the exclusive companion of the well-to-do is the peculiar gift of the traditional fee rule to our society. Economic power becomes determinative of legal rights irrespective of its position in the case. Wealthy plaintiffs can realize awards on groundless claims "because the defendant will prefer to

The system's two-pronged response to this dilemma—the contingent fee device and the legal aid office—has proven inadequate. The former has only a limited applicability, confined principally to the personal injury area.⁶ Legal aid, on the other hand, fails because there are too few offices, and too few talented and experienced lawyers willing to devote themselves to low income work.⁷ Moreover, as Ehrenzweig bitterly notes: "[A]ll the law now offers the little man, outside that second-rate court at some places and at some times, is charity. Legal aid, rather than legal right."⁸

In the recent case of *Mills v. Electric Auto-Lite Co.*,⁹ the Supreme Court may have taken steps to alter the traditional rule. *Mills* involved a stockholders' suit that failed to fit any of the traditional exceptions to the fee doctrine. Not only did the Court grant attorneys' fees to the plaintiff, but the broad language of the opinion suggests that basic changes in the fee-denying rule may soon follow. This comment will examine (1) the setting of the *Mills* decision, (2) the language of the case itself, and (3) the impact of the language on the traditional fee system.

I. THE BACKGROUND OF THE AMERICAN FEE SYSTEM PRIOR TO *Mills*

The federal courts have never completely followed the traditional anti-fee-shifting doctrine.¹⁰ Exceptions fall roughly into three categories.

pay the plaintiff an amount less than the expense of fighting the case. This is the nuisance value of the suit . . . a legalized form of blackmail." Kuenzel, *supra* note 3, at 78. On the other hand, the moneyed defendant "irrespective of the justice of his position, can wrest victory from his 'little' opponent by designedly protracting litigation, imposing an unbearable burden of attorney fees that can never be recouped." Stoebuck, *supra* note 3, at 202.

⁶ Where the anticipated award is not large, the contingent fee device is inoperative—creating a gap in practical legal rights which cuts hardest in the area of civil liberties. Kuenzel, *supra* note 3, at 78-86. Yet the contingent fee device is controversial even in those areas within which it is operative. For perspective on the "ambulance chasing" issue compare F.B. MACKINNON, *CONTINGENT FEES FOR LEGAL SERVICES* (1964), with the less enthusiastic Note, *Lawyer's Tightrope—Use and Abuse of Fees*, 41 CORNELL L. REV. 683, 699-700 (1956). Whatever the ethical effects on lawyers, the psychological impact on the poor may be far more important. In 1924 R. H. Smith wrote, "The man whose leg or arm has been cut off would prefer to accept half of the amount awarded him by a jury than to receive nothing through his inability to gain his day in court." R.H. SMITH, *JUSTICE AND THE POOR* 85 (1924). In 1970 when mass violence finds its origin in perceptions of helplessness and being cheated, half as much justice may no longer be acceptable. See REPORT OF THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 37-38 (1967). See also Note, *supra* note 3, at 1226, suggesting that a bar anxious to maintain the contingent fee device maintains a powerful vested interest in retaining the traditional fee rule.

⁷ Carlin & Howard, *supra* note 4, at 410, 416-17.

⁸ Ehrenzweig, *supra* note 1, at 796.

⁹ 396 U.S. 375 (1970).

¹⁰ An examination of fee shifting under state law is beyond the scope of this paper.

First, a limited number of federal statutes provide for mandatory fee shifting where the successful plaintiff has been injured by a violation of those statutes,¹¹ or where the defendant is forced to comply with the order of an administrative agency.¹² This exception represents a positive legislative determination as to the benefits of augmenting statutory regulations with private fee incentives.

The government has set up a regulatory system for the benefit of persons in the plaintiff's class. . . . Suits by plaintiffs, if well founded, are in the public interest. Therefore, the cost of prosecuting successful suits should be borne not by those who were victims but by those who have violated the regulations and caused the damage.¹³

A different philosophy is reflected in the second exception to the anti-fee doctrine. This exception consists of federal statutes which permit fee shifting to either plaintiff or defendant at the discretion of the court. Discretionary fee shifting under these statutes has generally been limited to situations where bad faith triggers fee transfer under a punishment rationale.¹⁴ Thus, fee granting under discretionary statutes re-

Stoebuck's article details a long list of statutes authorizing fee transfer under state law in everything from actions for divorce to actions for unpaid wages. "Taken together, the cases in which substantial attorney fees may be recovered comprise a sizable portion of American litigation" Stoebuck, *supra* note 3, at 210. Instances of fee shifting on the federal and state levels contrast sharply with traditional doctrine which labels fee transfer as impractical. "[T]his grafted litigation might possibly be more animated and protracted than in the original cause." *Maier Brewing Co. v. Fleischmann Distilling Corp.*, 359 F.2d 156, 159 (9th Cir. 1966).

¹¹ Clayton Act, 15 U.S.C. § 15 (1964); Communications Act of 1934, 47 U.S.C. § 206 (1964). As a corollary to the injury requirement, at least under the Clayton Act, the courts have held that no recovery of fees is possible where only injunctive relief is requested. *Alden-Rochelle, Inc. v. American Soc'y of Composers, Authors & Publishers*, 80 F. Supp. 888, 889 (S.D.N.Y. 1948).

¹² Packers & Stockyards Act, 7 U.S.C. § 210(f) (1964); Perishable Agricultural Commodities Act, 7 U.S.C. § 499g(b) (1964); Railway Labor Act, 45 U.S.C. § 153(p) (1964); Interstate Commerce Act, 49 U.S.C. § 16(2) (1964).

¹³ *Hutchinson v. William C. Barry, Inc.*, 50 F. Supp. 292, 298 (D. Mass. 1943).

¹⁴ For example, the Securities Act of 1933 levies fees where the suit or defense is "without merit," 15 U.S.C. § 77k(c) (1964); the Servicemen's Readjustment Act for violations committed "knowingly," 38 U.S.C. § 1822(b) (1964); and fees may not be shifted under the Trust Indenture Act if the litigant can prove that he acted in "good faith," 15 U.S.C. § 77www(a) (1964). Where specific statutory language is absent, the courts generally imply a good faith requirement, denying fee transfer under copyright law where the infringement results from honest mistake, *Ziegelheim v. Flohr*, 119 F. Supp. 324, 329 (E.D.N.Y. 1954); and under patent laws where there is a failure to find "unfairness or bad faith in the conduct of the losing party," *Keuffel & Esser Co. v. Masback, Inc.*, 131 F. Supp. 237, 238 (E.D.N.Y. 1955). While the punishment rationale has limited awards to plaintiffs, even more restrictive criteria are applied to fee awards to defendants. Note, *Attorney's Fees as an Element of Costs: The Copyright Experience*, 4 *GEORGIA L. REV.* 571, 581 (1970).

quires the party seeking to recover attorney's fees to win not only the merits of his case, but the sympathy of the court as well.¹⁵ Fee transfer under this punishment rationale implies significant limitations on the level of fee shifting. It focuses on the motives of the parties and ignores the broader issue of the restraints placed on private law enforcement by the high costs of litigation. Finally, when the awards are made, the amounts granted are generally regarded as insufficient; they are more closely related to the damage award than to the actual time spent in preparation for the case.¹⁶

The third exception consists of a number of extra-statutory, discretionary categories developed by the federal courts under color of their historic equity jurisdiction. Reflecting the discretionary practice under the statutes, the courts have chosen to shift fees in a limited number of areas, generally under a punishment rationale.¹⁷ However, there does exist a class of cases not based upon a punishment rationale. This "fund" category relates to that situation where plaintiff's representative action results in the creation of a fund, the economic benefit of which is shared by all the members of the represented class. The Supreme Court long ago held that failure to shift fees in this situation "would not only be unjust to [the plaintiff] but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage."¹⁸ Here the fee transfer is triggered not by the wrongdoing of the defendant, but by the positive benefit attendant to the plaintiff's action.

The equitable impulse to grant fees has made itself felt even in the face of statutory schemes where the court's discretion seems highly limited. In a cause of action arising under a statute which is itself silent on fees, complex questions are evoked as to whether the legislative remedies are supplementary or limiting. The force of the fee shifting impulse in a statutory context is demonstrated by three decades of developments in the trademark area.

As late as 1937, the Second Circuit recognized a theoretical power to grant fees in trademark infringement suits but concluded that "the

¹⁵ Note, *supra* note 14, at 576.

¹⁶ *Id.* at 588.

¹⁷ Fees are shifted in admiralty cases where "the default was willful and persistent," *Vaughan v. Atkinson*, 369 U.S. 527, 531 (1962); in contempt cases where "willfulness inherent in the contemptuous act is a major consideration," *In re Federal Facilities Realty Trust*, 227 F.2d 657, 658 (7th Cir. 1955); and generally, as in *Rolax v. Atlantic Coast Line R.R.*, 186 F.2d 473, 481 (4th Cir. 1950), where litigants "have been subjected to discriminatory and oppressive conduct." In the trademark exception "the absence of fraud . . . precludes allowance of counsel fees to plaintiff." *Fancee Free Mfg. Co. v. Fancy Free Fashions, Inc.*, 148 F. Supp. 825, 831 (S.D.N.Y. 1957).

¹⁸ *Trustees v. Greenough*, 105 U.S. 527, 532 (1882).

allowance of costs has with practical uniformity been restricted to those authorized by the fee bill or some other statutory provision."¹⁹ However, only three years later, the Seventh Circuit in *Alladin Mfg. Co. v. Mantle Lamp Co.*,²⁰ relying simply on its equitable powers and neither citing precedent nor providing discussion in support of the result, granted fees against a "wilful and fraudulent" infringer.

By the late 1950's the preference of the federal courts on the subject of fees was quite apparent. *Alladin* had become the departure point for a long line of decisions transferring fees in trademark infringement suits brought under the Lanham Act, which was itself silent on the fee question.²¹ Even in the face of intricate questions of statutory intent, the courts maintained that fees could be granted.

Mere silence and inaction by Congress cannot be held to have repealed what has been found to be a well established judicial power. Even though the Lanham Act may have been intended to be an integrated and comprehensive set of rules for trademark regulation and litigation to the exclusion of all conflicting rules, the retention of discretionary judicial power over the fixing of costs does not seem such a threat of inconsistency that it should by implication be held pre-empted or repealed by the Act.²²

The legal system was involved in what seemed to be a timely and appropriate reaction to a new sense of awareness about the relationship between legal fees and the practical availability of justice. Just as criticism of the American rule on fees had reached an all time high,²³ the courts were making use of their equitable power to grant fees with a regularity previously unmatched. Nevertheless, it was at this very point that the Supreme Court chose to take a stunning step backward, and in *Fleischmann Distilling Corp. v. Maier Brewing Co.*²⁴ not only

¹⁹ *Gold Dust Corp. v. Hoffenberg*, 87 F.2d 451, 453 (2d Cir. 1937). The court denied fees to the successful defendant after plaintiff failed to prove that "Silver Dust" was an infringement of plaintiff's trademark "Gold Dust."

²⁰ *Alladin Mfg. Co. v. Mantle Lamp Co.*, 116 F.2d 708, 717 (7th Cir. 1941). The successful plaintiff, a lamp manufacturer, had incurred legal expenses of over \$18,000 in proving that his trademark "Alladin" had been infringed. The court awarded counsel fees noting that "this sum was recoverable as compensatory damages."

²¹ See, e.g., *Wolfe v. National Lead Co.*, 272 F.2d 867 (9th Cir. 1959); *National Van Lines v. Dean*, 237 F.2d 688 (9th Cir. 1956); *Maternally Yours, Inc. v. Your Maternity Shop, Inc.*, 234 F.2d 538 (2d Cir. 1956); *Admiral Corp. v. Penco, Inc.*, 203 F.2d 517 (2d Cir. 1953).

²² *A. Smith Bowman Distillery, Inc. v. Schenley Distilleries, Inc.*, 204 F. Supp. 374, 377 (D. Del. 1962).

²³ Authorities cited note 3 *supra*.

²⁴ 386 U.S. 714 (1967).

destroyed the trademark exception, but created a reaction reaching the whole system, chilling the granting of attorney's fees in areas far afield of trademark litigation.

In *Fleischmann*, the Ninth Circuit had held that the congressional silence in the Lanham Act, and the lack of any positive rationale in the many fee-granting precedents, required the denial of fee transfer.²⁵ Surprisingly, the Supreme Court affirmed with a hard line defense of the traditional fee doctrine. The Court noted the uncertainties of litigation,²⁶ the necessity that "one should not be penalized for merely defending or prosecuting a lawsuit,"²⁷ and the "time, expense, and difficulties of proof inherent in the question of litigating what constitutes reasonable attorney's fees."²⁸

Fleischmann recognized only three limited, non-statutory exceptions to the general fee rule,²⁹ and concluded that "[w]hen a cause of action has been created by a statute which expressly provides the remedies for vindication of the cause, other remedies should not readily be implied."³⁰ The chilling effect on the lower courts soon became apparent as attorney's fees were denied on the basis of *Fleischmann* in actions brought under the Interstate Commerce Act³¹ and the Securities Exchange Act of 1934,³² both of which were silent on the question of attorney's fees in the relevant sections. It seemed that *Fleischmann* had

²⁵ *Maier Brewing Co. v. Fleischmann Distilling Corp.*, 359 F.2d 156, 159-61 (9th Cir. 1966).

²⁶ 386 U.S. at 718.

²⁷ *Id.*

²⁸ *Id.*

²⁹ The exceptions recognized involved the admiralty, the fund and the contempt cases. 386 U.S. at 718-19. See note 17 *supra*.

³⁰ 386 U.S. at 720.

³¹ *Michigan Pub. Serv. Comm'n v. Mackinac Transp. Co.*, 43 F.R.D. 202 (W.D. Mich. 1967), denied fees in an action brought under 49 U.S.C. § 1(20) (1964). That section is silent on attorney's fees. §§ 8, 15(9), and 16(2) of Part I of the Interstate Commerce Act specifically provide for the recovery of attorney's fees. 49 U.S.C. §§ 8, 15(9), 16(2) (1964). An identical result was achieved by the Eighth Circuit in *Missouri Pac. R.R. v. Slayton*, 407 F.2d 1078 (8th Cir. 1969). Here plaintiffs obtained a declaratory judgment as to their voting rights on a plan of consolidation which resulted in separate voting by Class A and Class B stockholders and the defeat of the proposed consolidation. In the action brought under the Interstate Commerce Act, 49 U.S.C. §§ 5, 5(11) (1964), the court held that "in our view the recent case of *Fleischmann Distilling Corp. v. Maier Brewing Co.* . . . controls the issue here. . . . As we read *Fleischmann*, exceptions to the general rule are sparingly granted. The factual situation here does not fall within any exceptions recognized by *Fleischmann*." 407 F.2d at 1082-83.

³² *Chaney v. Western States Title Ins. Co.*, 292 F. Supp. 376 (D. Utah 1968), where fees were denied in an action brought under the Securities Exchange Act of 1934, § 10(b), 15 U.S.C. 78j (1964). Fees were also denied in *Stevens v. Abbott, Procter & Painc*, 288 F. Supp. 836 (E.D. Va. 1968), where the court found a violation of § 10 of the Securities Exchange Act of 1934 prohibiting manipulative or deceptive devices in connection with sales of securities. 15 U.S.C. § 78j (1964).

ushered in an era of conservatism even at a time when the fee system was undergoing its greatest criticism.³³ The voices urging change had not only failed to alter official policy, but had seen thirty years of growth in court-created exceptions suddenly wiped out.

Nevertheless, in 1968 a civil rights case gave the Supreme Court the opportunity to register an apparent modification of its previously hostile attitude toward fee shifting. *Newman v. Piggie Park Enterprises, Inc.*³⁴ arose under Title II of the Civil Rights Act of 1964³⁵ which includes the following provision:

In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person.³⁶

Characteristically, the section had evolved into a means of punishment levied against recalcitrant defendants who had to be prodded by repeated suits before accepting the legislative mandate on integration.³⁷

It was this punishment aspect which had caused the circuit court to refuse to award fees below: "No litigant ought to be punished under the guise of an award of counsel fees (or in any other manner) from taking a position in court in which he honestly believes—however lacking in merit that position may be."³⁸

In its decision, the full importance of which is realized only in juxtaposition with *Mills*, the Supreme Court held that "one who succeeds in obtaining an injunction under that Title should ordinarily recover an attorney's fee unless circumstances should render such an award unjust."³⁹

In what appeared to be a marked change from its *Fleischmann* position, the Supreme Court went out of its way to increase the incidence of fee granting, at least in the civil rights area.⁴⁰ More importantly, the court de-emphasized the problem-laden punishment theory and provided instead the groundwork for a positive theory of fee shifting for the American system. The Court stated:

³³ See authorities cited note 3 *supra*.

³⁴ 390 U.S. 400 (1968).

³⁵ 42 U.S.C. § 2000a(c)(2) (1964), prohibiting discrimination in restaurants affecting interstate commerce within the meaning of the statute.

³⁶ 42 U.S.C. § 2000a-3(b) (1964).

³⁷ See *Cato v. Parham*, 293 F. Supp. 1375, 1378 (E.D.N.C. 1968).

³⁸ 377 F.2d 433, 437 (4th Cir. 1967).

³⁹ 390 U.S. at 402.

⁴⁰ See Note, *Civil Rights—Attorney's Fees*, 4 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 223 (1969), concluding at 225: "No logical imperative leads to the conclusion that Congress intended a mandatory fee. If Congress had so intended, it could have explicitly done so."

A Title II suit is . . . private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority.⁴¹

Following *Piggie Park*, the lower federal courts have shown a marked propensity to award fees in civil rights cases. For example, in litigation involving school desegregation,⁴² legislative reapportionment,⁴³ and police misconduct,⁴⁴ lower federal courts awarded fees without express congressional authorization. In *Mills* the Supreme Court was squarely confronted with the issue of whether this emerging liberalism of the federal courts should be curtailed or encouraged.

II. MILLS V. ELECTRIC AUTO-LITE CO.

In *Mills* stockholders in Electric Auto-Lite Company sought to dissolve a 1936 merger of their company with Mergenthaler Linotype. The legal rationale was an alleged violation of rule 14(a) of the Securities Exchange Act of 1934, forbidding solicitation of shareholders'

⁴¹ 390 U.S. at 401-02. The theory of private attorneys general which is now being used effectively to encourage fee shifting, has previously had impact upon determinations of who has standing to challenge administrative action. See K.C. DAVIS, 3 ADMINISTRATIVE LAW TREATISE § 22.05, at 225 (1958). A landmark opinion is that of Judge Jerome Frank in *Associated Indus. v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943), *dismissed as moot*, 320 U.S. 707 (1943): "Congress can constitutionally enact a statute conferring on any non-official person . . . authority to bring a suit to prevent an action by an officer in violation of his statutory powers . . . even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals."

⁴² *Cato v. Parham*, 293 F. Supp. 1375 (E.D.N.C. 1968). The action in *Cato* was non-statutory, and was brought to compel desegregation conforming to the Supreme Court's interpretation of the constitutional requirements. The court cited *Piggie Park* saying: "While that decision is not binding here, it is suggestive." 293 F. Supp. at 1378.

⁴³ *Dyer v. Love*, 307 F. Supp. 974 (N.D. Miss. 1969). Plaintiffs invoked 42 U.S.C. §§ 1983, 1988 (1964) and claimed that the alleged population disparities between districts which each elected one member to the board of supervisors constituted invidious discrimination in violation of the fourteenth amendment. Only three years earlier the same court had denied fees in a similar case, *Damon v. Lauderdale County Bd. of Supervisors*, 254 F. Supp. 918 (S.D. Miss. 1966), where plaintiffs brought suit to compel realignment of precincts in a county to conform with the constitutional requirements of one man-one vote. In denying fees, the court stated at 918: "It is not without significance in view of the general rule as to the award of attorneys' fees as cost, that the Congress provided in the Civil Rights Act of 1964 . . . for the discretionary award of attorneys' fees in certain cases, not including the case at bar."

⁴⁴ *Kerr v. City of Chicago*, 6 CRIM. L. REP. 2448 (7th Cir. 1970). Here a civil action was brought under 42 U.S.C. §§ 1983, 1988 (1964) alleging involuntary confession and numerous violations of plaintiff's civil rights. In granting attorney's fees the Seventh Circuit held: "Federal common law controls the question of damages in civil rights actions with the purpose being to vindicate the civil rights of individuals."

votes by a materially misleading proxy statement.⁴⁵ After ruling that the proxy statement was indeed materially misleading and remanding to the district court for consideration of the proper relief, the Supreme Court turned to the request of the Solicitor General that the plaintiffs be granted an interim award of attorneys' fees. The question had been introduced in the government's *amicus curiae* brief and had been almost totally ignored by the litigating parties.⁴⁶

The request for fees presented major difficulties. Since only the issue of liability was before it, the Court was being asked to make an award of fees without knowing what the final resolution of the plaintiff's action would be. More importantly, the action had been brought under the statutory authority of section 14(a), which itself was completely silent on the question of fees. This was in sharp contrast to sections 9(e) and 18(a)⁴⁷ of the same act in which Congress had specifically provided for fee shifting. The juxtaposition seemed to bring the *Mills* facts directly under the *Fleischmann* doctrine that exceptions to the traditional fee rule should not be developed "in the context of statutory causes of action for which the legislature had provided intricate remedies."⁴⁸ Another factor which seemed to make 14(a) an inappropriate setting for fee transfer was its failure to authorize in explicit terms a private right of action. That private right for stockholders had itself been implied earlier in the landmark case of *J. I. Case Co. v. Borak*.⁴⁹ Thus the circumstances seemed to support the traditional response—that fee shifting in this case was unauthorized by congressional will.⁵⁰

⁴⁵ Securities Exchange Act of 1934, § 14(a), 48 Stat. 895 (1934), as amended 15 U.S.C. § 78n(a) (1964).

It shall be unlawful for any person, by use of the mails or by any means or instrumentality of interstate commerce or of any facility of any national securities exchange or otherwise to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered on any national securities exchange in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

⁴⁶ The government maintained, ". . . in our view, the plaintiffs, who have established a violation of the securities laws by their corporation and its officials, are entitled to litigation expenses and reasonable attorneys' fees. . . ." Brief for the United States as *Amicus Curiae* at 19, *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970).

⁴⁷ §§ 9(e) and 18(a) concern respectively manipulation of securities prices and misleading statements in documents filed with the Commissioner. 15 U.S.C. §§ 78i(e), 78r(a) (1964).

⁴⁸ 386 U.S. at 719.

⁴⁹ 377 U.S. 426 (1964).

⁵⁰ Justice Black concluded in dissent, "The courts are interpreters, not creators, of legal rights to recover and if there is a need for recovery of attorneys' fees to effectuate the policies of the Act here involved, that need should in my judgment be met by Congress, not by this Court." 396 U.S. at 397. One district court held, in a like situation, that to grant fees here "would be basing an implication on an implication—an implied right to attorney's fees based on an implied civil liability." That court went on to note that the authorities including *Fleischmann* "at best deflate the idea and at worst prohibit it." *Chaney v. Western States Title Ins. Co.*, 292 F. Supp. 376, 379 (D. Utah 1968).

Nevertheless, the *Mills* Court chose to interpret congressional silence not as a prohibition, but as an authorization to the court to decide the attorneys' fee issue.⁵¹ The silence which two years earlier in *Fleischmann* had meant the absence of congressional intent now became a mandate to create and implement private remedies. The Court in *Mills* does not clearly repudiate *Fleischmann*; rather, it takes some pains to distinguish the earlier case and to limit its conclusions to the Lanham Act, where Congress had "meticulously detailed the remedies available to a plaintiff who proves his valid trademark had been infringed."⁵²

While the Lanham Act admittedly did provide remedies not available to the successful Securities Exchange Act plaintiff, the change in philosophy since *Fleischmann* was obvious. Gone was the broad language indicating that exceptions to the fee rule were few and far between. Also gone were the implications that these exceptions were out of place in a statutory cause of action. Now "these sections merely enforce an additional penalty against the wrongdoer."⁵³ The analytical process is completely reversed. Where previously the courts were led to start with the traditional rule and then ascertain whether the case fell into one of the three *Fleischmann*-approved exceptions, now they are to start with the equitable power of the courts to grant appropriate remedies with the burden on the other side to prove a legislative "purpose to circumscribe the courts' power."⁵⁴

Having surmounted the obstacle of congressional silence, the Court was still faced with the task of locating a viable fee shifting rationale. Nothing in the facts of *Mills* justified granting fees under any of the traditional exceptions to the fee rule.⁵⁵ Fee recovery in a stockholder's suit was normally accomplished under only a "fund" rationale,⁵⁶ but here no monetary recovery was sought. The Court needed a development which in its own words had moved far "from the traditional

51 ". . . leaving the courts with the task, faced by this Court in *Borak*, of deciding whether a private right of action should be implied. The courts must similarly determine whether the special circumstances exist that would justify an award of attorneys' fees" 396 U.S. at 391.

52 *Id.* (quoting *Fleischmann*). The Court continues, "By contrast, we cannot fairly infer from the Securities Exchange Act of 1934 a purpose to circumscribe the courts' power to grant appropriate remedies." The Court does not seem overly concerned with maintaining the traditional facade of uniformity on the fee question: "both the courts and Congress have developed exceptions to this rule for situations in which overriding considerations indicate the need for such a recovery." 396 U.S. at 391-92.

53 396 U.S. at 390 (quoting *Smolowe v. Delendo Corp.*, 136 F.2d 231, 241 (2d Cir. 1943)).

54 396 U.S. at 391.

55 While *Smolowe v. Delendo*, 136 F.2d 231, 241 (2d Cir. 1943), provided a circuit court precedent for ignoring the silence-as-bar rule, there the rationale for the actual fee transfer was the creation of a fund.

56 See generally Hornstein, *The Counsel Fee in Stockholder's Derivative Suits*, 39 COLUM. L. REV. 784 (1939).

metes and bounds of the doctrine."⁵⁷ The development to which the Court turned had been initiated by a Supreme Court case, but from that point on had been entirely the child of the state courts. The seminal decision was *Sprague v. Ticonic National Bank*,⁵⁸ in which the plaintiff, by vindicating her rights to a trust, established the rights of fourteen others whom she never purported to represent. This was not the creation of a fund in the traditional sense, but Justice Frankfurter, speaking for the Court, refused to hold the exception within its formal limits:

[T]he formalities of the litigation—the absence of an avowed class suit or the creation of a fund, as it were, through *stare decisis* rather than through a decree—hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation.⁵⁹

It was in the state courts that the "formalities" really began to yield to newly emerging policy imperatives. *Abrams v. Textile Realty Corp.*⁶⁰ and *Bosch v. Meeker Cooperative Power and Light Ass'n*,⁶¹ both cited in *Mills*, adopted a law enforcement-as-benefit rationale to award fees to stockholder plaintiffs even where no fund was created. In *Abrams* the defendant argued that while plaintiff's suit had prevented ultra vires acts, economically speaking it had been detrimental to the corporation.⁶² However, the New York Supreme Court responded that "the law cannot refuse to recognize as beneficial full observance of the law. The law cannot hold that corporate interests are better served by actions outside the law than within the law."⁶³ Similarly, the Minnesota Supreme Court in *Bosch* affirmed the concept of law enforcement-as-benefit, cautioning only that the benefit must be "substantial."⁶⁴

In support of its move to a non-fund fee-shifting rationale, the *Mills* Court, like the court in *Bosch*, made substantial reference to a number of articles by George Hornstein. As Hornstein described the problem, the stockholder's suit was the case of David and Goliath, with David unable to afford the slingshot. Laws which authorized private

⁵⁷ 396 U.S. at 393.

⁵⁸ 307 U.S. 161 (1939).

⁵⁹ *Id.* at 167.

⁶⁰ *Abrams v. Textile Realty Corp.*, 97 N.Y.S.2d 492 (Sup. Ct. 1949). Here the stockholder proved that the corporation's manner of entering into a mortgage agreement was contrary to the existing indenture and voting trust agreement.

⁶¹ 257 Minn. 362, 101 N.W.2d 423 (1960). Plaintiff obtained a declaratory judgment that the election of directors conducted by mail as well as a proposed amendment to the bylaws was illegal.

⁶² 97 N.Y.S.2d at 496.

⁶³ *Id.*

⁶⁴ 257 Minn. at 366, 101 N.W.2d at 426.

actions against corporate defendants were rendered ineffective by the traditional fee rule.⁶⁵ The practical reality was that few stockholders could afford the high cost of corporate litigation,⁶⁶ especially as augmented by the deliberate delaying tactics of the corporate defendant. Hornstein concluded that effective enforcement mandated the shifting of attorney's fees to the successful plaintiff as a "necessary concomitant of allowing the stockholder's derivative suit, which is vital to the exposure and redress of corporate abuse."⁶⁷

Perhaps as important as Hornstein's definition of the situation was his ability to label the formulated remedy. In describing the process by which the shifting of fees would facilitate stockholder's suits, thereby promoting fair conduct throughout the corporate world, Hornstein hit upon the term "legal" or "corporate therapeutics."⁶⁸ The term had the advantage of bringing to mind a positive process image of the function of increasing law enforcement by shifting the fee burden.

In accepting the rulings of *Abrams* and *Bosch*, together with the Hornstein terminology, the *Mills* Court legitimized a stockholder's suit fee exception based solely on law enforcement policy considerations.⁶⁹ The Court was concerned not with the benefit of this suit to these shareholders, but with the benefit of this type of suit to the public interest: "[P]rivate stockholders' actions of this sort 'involve corporate therapeutics,' and furnish a benefit to all shareholders by providing an important means of enforcement of the proxy statute."⁷⁰ Reimbursement for attorney's fees is a means of enforcing the law. In short, the Court granted an award for acting as a private attorney general. Moreover, the Court stated its basic principle in terms not limited to stockholder's suits, authorizing the shifting of fees in all cases "where a plaintiff has successfully maintained a suit, usually on behalf of a class,

⁶⁵ Hornstein, *Legal Therapeutics—The "Salvage" Factor in Counsel Fee Awards*, 69 HARV. L. REV. 658 (1956).

⁶⁶ Hornstein, *supra* note 56, at 791.

⁶⁷ *Id.* at 816.

⁶⁸ Hornstein, *supra* note 65.

⁶⁹ This is the narrow holding of the court: "[P]etitioners, who have established a violation of the securities laws by their corporation and its officials, should be reimbursed by the corporation or its survivor for the costs of establishing the violation." 396 U.S. at 389-90. This narrow holding was responsive to the amicus curiae brief of the United States which in originally raising the issue had asserted that in cases which involve "corporate therapeutics" the absence of express statutory authorization should be no bar to fee granting. Brief for the United States as Amicus Curiae at 21.

⁷⁰ 396 U.S. at 396. A further indication that the benefit language acts as little more than a facade for societal policy imperatives is the criterion delineated in the *Mills* fact situation where the reference point is not the corporate defendant but the Congress. "[T]he stress placed by Congress on the importance of fair and informed corporate suffrage leads to the conclusion that, in vindicating the statutory policy, petitioners have rendered a substantial service to the corporation and its shareholders." *Id.*

that benefits a group of others in the same manner as himself."⁷¹ In thus broadening the concept of benefit as well as its area of application, the Court introduced the potential for radical changes in the traditional fee doctrine.

III. IMPLICATIONS OF THE *Mills* DOCTRINE

It is impossible to predict whether the courts will take full advantage of the opportunities implicit in the *Mills* language. At the very least, the opinion should resolve the ambiguities created by the parallel existence of *Fleischmann* and *Piggie Park*. *Mills* may properly be viewed as an extension of the policy initiated in *Piggie Park*. Both cases disregarded the traditional but unsatisfactory punishment rationale, and in its place established the outlines of a positive theory of fee transfer. Whether it be labeled "private attorney general" or "benefit" or "legal therapeutics," the moving concept is the same—whatever the theoretical disadvantages, the need to provide the individual with private law enforcing power makes fee shifting a practical necessity.

Mills is an affirmation of the pre-*Fleischmann* and post-*Piggie Park* fee shifting trend. As such it should result in some defrosting of the *Fleischmann* chill and in a resumption in the expansion of fee transfer within the traditional exceptions. The *Mills* doctrine provides a counter-pole to the traditional anti-fee-shifting dogma and thereby provides the theoretical substructure so evidently lacking in the trademark cases.⁷² In this context the "benefit" and "therapeutics" language which for so long animated the stockholder's development can be expected to be equally effective in other areas. Moreover, the courts now have the opportunity to de-emphasize the old process of scrutinizing each factual situation for the elements of "bad faith" necessary to trigger fee transfer under the old punishment rationale.⁷³ Now the dominant element in the decision-making process may be the emergence of a consensus as to the societal benefits of encouraging private law enforcement. This shift in analytical perspective from the variables of a given factual situation to the constant of a public policy consensus may have an

⁷¹ 396 U.S. at 392. According to the Court, the law has developed such that fees may be shifted "where the litigation has conferred a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them." 396 U.S. at 393-94.

⁷² See generally *Maier Brewing Co. v. Fleischmann Distilling Corp.*, 359 F.2d 156 (9th Cir. 1966).

⁷³ See *Hartford Nat'l Bank & Trust Co. v. E.F. Drew & Co.*, 188 F. Supp. 353, 363 n.52 (D. Del. 1960), stating: "The cases on allowance of attorneys fees could be multiplied by the hundreds both plus and minus depending on the facts of each case."

effect tantamount to the *Piggie Park* language—making future discretionary fee shifting ordinary.

The broader impact of *Mills* lies in its “benefit” language augmented by the simultaneous adoption of the supportive therapeutics principle. “Legal therapeutics” is essentially a restatement of the deterrence theory with the emphasis switched from public to private action.⁷⁴ It confronts the problem of prohibitively high litigation costs, and as such need not be limited to corporate finance or stockholder’s suits. Hornstein’s corporate world is nothing but a microcosm of the society-wide effects of the traditional rule, and if successful litigation to enforce the law makes for a better corporate world, it also makes for a world of viable civil rights, more consumer protection and less air pollution.⁷⁵ The following examples illustrate the potential impact of a positive *Mills* development.

Actions challenging administrative decisions provide a primary protection against feeble law enforcement of pollution laws, and both courts and legislatures have moved to strengthen that protection. Previously restrictive rules on standing to sue have been broadened⁷⁶ and the National Environmental Policy Act of 1969⁷⁷ has given new scope to the power of judicial review. However, the cost of litigation has chilled private challenges to administrative decision:

The trial may be lengthy and complex. Its conduct is a difficult burden for the attorneys having the burden of proof assigned to them by the substantial evidence—rational-basis rule, and

⁷⁴ “They are therapeutic, helping to maintain the health of our corporate system. In hundreds of suits which would not have been instituted without the allure of generous compensation, a miscarriage of justice has been prevented. At the same time the record of litigated cases is prophylactic—a deterrent to future wrongdoing. Every successful suit duly rewarded encourages other suits to redress misconduct and by the same token discourages misconduct which would occasion suit.” Hornstein, *supra* note 65, at 663.

⁷⁵ It must be recognized, however, that the actual response to a fee incentive may vary tremendously because of factors outside the control of the courts. Attorney’s fees are often not the only deterrent to increased private law enforcement. Where, as in civil rights, the gap between the present crisis and full protection is a result of lack of trust, fear, ignorance and the political distastefulness of civil rights suits, as well as the fee system, a change in the fee allocation alone can be expected to have a minimal effect. See V. COUNTRYMAN, *THE LAWYER IN MODERN SOCIETY* pt. VI, at 81-126 (1962).

⁷⁶ See *Scenic Hudson Preservation Conference v. Federal Power Comm’n*, 354 F.2d 608 (2d Cir. 1965). One commentator noted that this case could result in environmental action groups becoming the “vanguard of an assault on environmental pollution through the courts.” Esposito, *Air and Water Pollution: What To Do While Waiting for Washington*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 32, 36 (1970).

⁷⁷ 83 Stat. 852 (1970). The act provides a more thoroughgoing process, and an expanded concept of the kinds of data and expertise relevant to an evaluation of an administrative decision. Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612, 649-50 (1970).

who are not compensated at all, or compensated at a small fraction of the amounts to which they are ordinarily entitled.⁷⁸

This kind of suit offers an excellent opportunity for an expansive *Mills* effect. It comes to the court fused with the clear public policy imperatives of a statutory regulation. In addition, the relationship of the parties is reflective of the *Mills* factual situation, since the government may be said to stand in the same relation to the citizen as the corporation to the stockholder. Forcing the government to pay fees is a method of spreading the burden of enforcement among all the taxpayers, who are the beneficiaries of that enforcement. Such a result falls easily within the *Mills* language of benefit "on the members of an ascertainable class,"⁷⁹ and an award "that will operate to spread the costs proportionately among them."⁸⁰

Mills may similarly facilitate private actions directly against the violating party. This is particularly true in those areas such as consumer protection and pollution control where injunctive relief against the violator emerges as the most effective, if not the only, relief available.⁸¹ Prior to *Mills* the private suit for injunctive relief was less than a practical option; plaintiffs needed large damage awards from which the contingent fee device could generate legal fee payments. One commentator noted that the environmental lawyer faces the same kind of mammoth defendant as the stockholder's attorney, yet he lacks the fee-shifting advantages traditional in the stockholder's suit.⁸² Likewise, the failure of attorneys to realize the potential of the injunctive remedy in consumer actions has been linked directly to the fee implications of by-passing a damage award.⁸³

Although the plaintiff and defendant in the private injunctive action may lack the kind of formal relationship between the plaintiff and nominal defendant in *Mills*, the same policy considerations underlie both cases—the importance of the therapeutic benefit derived from statutory enforcement. Moreover, the effective support of private attorneys general would seem to mandate a judicial focus on the reception

⁷⁸ Sive, *supra* note 77, at 619.

⁷⁹ 396 U.S. at 394.

⁸⁰ *Id.*

⁸¹ Its flexible enforcement powers acting directly on the person of the defendant make it appropriate in preventing continuing violations. Starrs, *The Consumer Class Action—Part I: Considerations of Equity*, 49 B.U.L. REV. 211, 213 (1969). In addition, in pollution cases injunctive relief avoids the complex problem of allocating damages among a multitude of polluters. Note, *Private Remedies for Water Pollution*, 70 COLUM. L. REV. 735, 747 (1970).

⁸² Sive, *supra* note 77, at 618.

⁸³ Starrs, *supra* note 81, at 212.

of the recognized and costly "benefit" rather than on the formal relationship between the parties.

Such an approach would make a whole range of injunctive, law-enforcing suits practical, irrespective of the absence of a damage award. That focus would in addition support the creation of a fee incentive which can be of significant value even where a damage award is authorized. For example, sections 1983,⁸⁴ 1985,⁸⁵ and 1986⁸⁶ of the Civil Rights Act authorize civil actions for damages. The courts have utilized these statutes to protect such varied freedoms as freedom of assembly,⁸⁷ freedom from unreasonable search,⁸⁸ and protection from batteries committed incident to an arrest or imprisonment.⁸⁹ Yet here too the insufficiency of the potential award has resulted in circumscribed use of the authorized suits.⁹⁰

Moreover, the potential for a *Mills* impact goes beyond those statutes explicitly authorizing a private right of action. Where a statutory scheme does not admit of a private right, the courts are increasingly willing to imply such an action. For example, although the Voting Rights Act of 1965 is silent as to actions other than those initiated by the Attorney General,⁹¹ the Supreme Court did not hesitate to find an implied private right of action in the landmark case of *Allen v. Board of Elections*.⁹² Indeed, *Mills* itself involved such an implied right of action.

Moreover, the benefit rationale carried to its logical extreme cannot be limited to actions tied to concrete expressions of legislative intent. If law enforcement is the acknowledged benefit, there is little reason to view the law of contracts as being of any less importance than the Securities Exchange Act of 1934. Yet such a broad application of *Mills* would represent a complete reversal of the traditional fee system.

Of course the courts may ignore the logic of the "benefit" language; there are numerous ways in which the courts may limit *Mills*. First, the case may be confined to its facts in the same manner that the Supreme Court in *Mills* distinguished *Fleischmann*—discriminating be-

⁸⁴ 42 U.S.C. § 1983 (1964).

⁸⁵ 42 U.S.C. § 1985 (1964).

⁸⁶ 42 U.S.C. § 1986 (1964).

⁸⁷ *Hague v. CIO*, 307 U.S. 496 (1939).

⁸⁸ *Lucero v. Donovan*, 354 F.2d 16 (9th Cir. 1965).

⁸⁹ *Marland v. Heyse*, 315 F.2d 312 (10th Cir. 1963).

⁹⁰ Note, *Civil Actions for Damages Under the Federal Civil Rights Statutes*, 45 TEXAS L. REV. 1015, 1035 (1967).

⁹¹ 42 U.S.C. §§ 1973j(d)-(e) (Supp. I, 1965).

⁹² 393 U.S. 544 (1969), stating at 556: "The achievement of the Act's laudable goals could be severely hampered, however, if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General."

tween statutes on the basis of the specificity of remedies contained therein. Arguments limiting *Mills* to a narrow factual situation gain weight from the particular statutory context in which *Mills* arose. The Securities Exchange Act explicitly permits private rights of action in three sections—18,⁹³ 9(e),⁹⁴ and 16(b).⁹⁵ Of those three the first two specifically authorize fee shifting, but 16(b) is silent on that question. However, in *Smolowe v. Delendo*,⁹⁶ the successful 16(b) plaintiff was permitted to recover attorney's fees on the basis of the traditional fund exception. One analysis of *Smolowe* argues that it simply brought internal symmetry to the act by permitting fee shifting in all private actions including 16(b). In this perspective, *Mills* signifies nothing more than the completion of the cycle by providing fee transfer for the newly implied private action under section 14(a). Such an analysis would limit a *Mills* application to those statutory schemes where a similar symmetry argument could be made. However, nothing in the language gives support to so restrictive an analysis, and one may suppose that if the Court was attempting to establish such a meticulous symmetry, it would have left something in the language to indicate that intent. Indeed, such a narrow interpretation would be entirely inconsistent with the broad tenor of the opinion.

Second, the "benefit" language is open to various technical interpretations. *Mills* ties the benefit to "corporate therapeutics,"⁹⁷ and "the stress placed by Congress on the importance of fair and informed corporate suffrage."⁹⁸ The Supreme Court looked neither to the actual effect on the specific corporation nor to the motives of the plaintiffs. Placing judicial emphasis on either of these two criteria could produce radically different results under the same rule. Scrutinizing the intentions of the plaintiffs would undoubtedly uncover some private motive for the suit in almost every case, and examining the concrete effects on the particular corporation might rule out "minor" benefits such as temporary injunctions. Such a result clearly would contravene the core of the *Mills* process, whereby fees were shifted without regard to the eventual remedy. However, emphasis on these factors is a real possibility, not to be lightly dismissed.

The recent case of *Yablonski v. United Mine Workers of America*⁹⁹

⁹³ 15 U.S.C. § 78r(a) (1964).

⁹⁴ 15 U.S.C. § 78i(e) (1964).

⁹⁵ 15 U.S.C. § 78p(b) (1964).

⁹⁶ 136 F.2d 231 (2d Cir. 1943), *cert. denied*, 320 U.S. 751 (1943). Here the successful 16(b) plaintiff recovered over \$18,000 for the corporation.

⁹⁷ 396 U.S. at 396.

⁹⁸ *Id.*

⁹⁹ 4 CCH LAB. L. REP. ¶ 10,996, at 19,202 (D.D.C. 1970), *appeal docketed*, Nos. 24,560, 24,561, 24,562, 24,563 (D.C. Cir. Aug. 20, 1970).

is an unfortunate example of the potential impact of such limitations. The case was brought under provisions of the Labor Management Reporting and Disclosure Act of 1959¹⁰⁰ which are silent as to attorney's fees. Two other sections of the same act explicitly provide for fee shifting.¹⁰¹ Ignoring the broad policy arguments behind the *Mills* decision, the district court decided this case on a specificity-of-remedies test. Noting the "degree of similarity in the specificity of remedies between the LMRDA and the Lanham Act,"¹⁰² the court found the case to be governed by *Fleischmann*. As to the benefit criterion the court held that it was not satisfied that the suits "were intended to or did benefit the union except in the most indirect and theoretical way."¹⁰³

Aside from these potential, technical limitations, substantive questions of interpreting the actual nature of the fee transfer effected in *Mills* may arise. *Mills* held that the benefited class must pay the fees of the plaintiff whose suit had created the benefit. Yet this rationale was enunciated in the context of a stockholders' suit which, in a formal sense, was the action of a few stockholders on behalf of all the others. It might be argued that there was no real shifting of the burden of fees from plaintiff to defendant. The corporate defendant is made to pay merely as a means of distributing costs among the "true plaintiffs"—that is, the stockholders on whose behalf the suit was brought. As stated in *Mills*:

To award attorneys' fees in such a suit to a plaintiff who has succeeded in establishing a cause of action is not to saddle the unsuccessful party with the expenses but to impose them on the class that has benefited from them and that would have had to pay them had it brought the suit.¹⁰⁴

However, unless one is willing to torture the concept of identity of interest, the assertion that *Mills* does not involve true fee shifting fails to make sense in light of the fact situation. Here over fifty per cent of the stockholders were opposed to enforcement of the Securities Exchange Act regulations. Where a majority of the stockholders has an interest opposed to the litigation, the payment of fees by the corporation represents true fee transfer.

The possibility of imposing a general policy limitation on *Mills* seems difficult. The entire benefit concept implies a judgment that the advantages that fee shifting produces by encouraging private actions

¹⁰⁰ 29 U.S.C. §§ 481(c), 529, 481(g) (1964).

¹⁰¹ *Id.* §§ 501(b), 431(c) (1964).

¹⁰² 4 CCH LAB. L. REP. ¶ 10,996, at 19,205 (D.D.C. 1970).

¹⁰³ *Id.*

¹⁰⁴ 396 U.S. at 396-97.

outweigh the disadvantages of possible nuisance suits. Yet, in certain areas, the potential benefit to the public interest may be overshadowed by the possible negative impact of actions brought to remedy merely technical violations. This is especially true insofar as *Mills* alters the previous practice of proportioning attorney's fees in direct relationship to the financial award.¹⁰⁵ No test which would successfully resolve such a conflict can exist consistently with the *Mills* rationale, where concrete tests based on economic benefit were discarded in favor of a focus on "the stress placed by Congress on the importance of fair and informed corporate suffrage."¹⁰⁶ Since there is no reason to assume that Congress felt more strongly about the securities laws than about the civil rights laws, the consumer protection laws, or indeed any other legislation, the content of the *Mills* benefit test may be that the very existence of legislation evidences the beneficial effect of its own enforcement. However, to certify every enforcement of legislation as beneficial may be to invite an increase in suits whose chief motivation is their nuisance value.

Parallels drawn from equitable fee shifting under section 16(b) of the Securities Exchange Act¹⁰⁷ indicate that fees may be shifted even where no actual litigation has taken place. Although fee transfer in 16(b) takes place under the traditional fund rationale, the courts still

¹⁰⁵ See Hornstein, *supra* note 65, at 663-64, arguing that a salvage analogy is and should be the principle followed in awarding attorney's fees in stockholder's suits.

¹⁰⁶ 396 U.S. at 396. While the maintenance of a direct relationship between financial benefit and fee award obviates the problem of nuisance suits, it implies significant limitations on its efficacy as a general principle of fee transfer. Where the amounts involved are small, the fee award will come nowhere near the actual costs of retaining counsel. To the extent that *Mills* may herald the dissociation of the fee award from the dollar amount of the damages, it may breathe new life into consumer actions, for instance, where characteristically the amounts involved are not large.

¹⁰⁷ 15 U.S.C. § 78p(b) (1964):

For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection.

have had difficulty defining its boundaries. For example, awards of attorney's fees have been made where the stockholder's efforts have caused the insider to pay up without the institution of an action.

If the objective is the recovery by the corporation of unlawful profits, would it be reasonable to say that a stockholder shall be entitled to all his expenses if he needs to bring suit, but he shall be denied reimbursement where the same benefit to the corporation has resulted without the necessity of legal proceedings but at less expense? That would be penalizing efficiency and expediency.¹⁰⁸

More recent opinions have qualified the right to award fees independent of an actual court action. In *Blau v. Rayette-Faberge, Inc.*,¹⁰⁹ the Second Circuit attempted to find a "middle ground" between complete denial of fees and automatic shifting which would encourage attorneys to attempt to find a cause of action before the corporation does.

Reimbursement for information leading to corporate recovery will be allowed only if the corporation has done nothing for a substantial period of time after the suspect transactions and its inaction is likely to continue.¹¹⁰

Clearly fee shifting under 14(a) may give rise to the same kind of pre-litigation fee demands inspired by the 16(b) development, resulting in the same tenuous and difficult efforts to find a viable middle ground.

In the corporate context, the prospect of fee shifting after long litigation about technical violations, or an abundance of pre-litigation fee transfer demands, may tip the burden too far against the corporation and result in an increasingly timid corporate directorship. A negative experience in the corporate sector can be expected to cancel any potential for an expansion of the *Mills* principle. On balance, it is possible that the courts may discover that the nuisance value of *Mills* may outweigh the enforcement benefits. The nuisance potential may become particularly acute if *Mills* is not expanded to include the successful defendant as well as the successful plaintiff, but authority for such an expansion is hard to find in the *Mills* opinion. The imperatives of encouraging private law enforcement do not mandate shifting the fee burden from the successful defendant. Indeed, such a result might act

¹⁰⁸ *Dottenheim v. Emerson Elec. Mfg. Co.*, 77 F. Supp. 306 (E.D.N.Y. 1947). See also *Globus, Inc. v. Jaroff*, 279 F. Supp. 807 (S.D.N.Y. 1968); *Henss v. Schneider*, 132 F. Supp. 60 (S.D.N.Y. 1955); and L. Loss, *SECURITIES REGULATION* 1054 (2d ed. 1962) noting, "This view, it is understood, has been consistently followed in a number of unreported instances. It is certainly sound, given the present statutory scheme."

¹⁰⁹ 389 F.2d 469 (2d Cir. 1968).

¹¹⁰ *Id.* at 473.

to chill the private enforcement potentials that *Mills* attempts to realize. Yet to reserve the advantages of fee shifting to plaintiffs alone may not only offend a court's refined sense of mutuality, but may result in an overburdening of a legal system already threatened with congestive breakdown.

IV. CONCLUSION

Mills did not intend to restructure the entire fee system. It was an attempt to reconcile an outmoded fee process with what the Court recognized as the compelling policy considerations of a new era. Explicit authorization to shift fees from successful defendants or even from all successful plaintiffs was not even considered. Yet the logic of the case provides no limitations, the principles evoked are without bounds, and the language chosen lends itself easily to the most expansive development. Logically, one of two things must happen: either judicial discretion to grant fees on policy grounds will result in universal fee shifting from the successful party, or the courts will withdraw to the traditional position, denying any fee transfer without specific statutory authorization. *Mills* represents an uneasy half-way house between these two extremes.

ATTORNEY'S FEES IN PUBLIC INTEREST LITIGATION

PETER NUSSBAUM*

Recent years have seen a steady growth in public interest litigation. This expansion, however, and its attendant social benefits, have been severely restricted by the high costs of public interest lawsuits, particularly attorney's fees. After discussing the importance of awarding counsel costs in such suits, Mr. Nussbaum examines three categories of cases in which fees have traditionally been granted, and then traces a development in the Supreme Court and the lower federal courts toward awarding fees to plaintiffs who help to effectuate important social policies by securing benefits which inure to a class or group they represent. He concludes by arguing that unless there is a specific statutory prohibition, courts should grant counsel costs as a matter of course to successful plaintiffs who have acted to vindicate the public interest.

I

INTRODUCTION

IN recent years, we have witnessed the expansion of what is widely referred to as "public interest litigation."¹ Putting aside for the moment any attempt to arrive at a precise definition of the term "public interest," it is apparent that the increase in such litigation is attributable to several factors. Foremost, perhaps, is the growing complexity of our society. It is no longer possible to govern through town meetings, and the legislative process seems fraught with interminable delays.² The result, as Justice Douglas has noted, is that the judiciary "is often the one and only place where effective relief can be obtained."³

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¹ See ABA Section on Individual Rights and Responsibilities, *The Private Law Firm and Pro Bono Publico Programs: A Responsive Merger* (1971); Cahn & Cahn, *Power to the People or the Profession?—The Public Interest in Public Interest Law*, 79 Yale L.J. 1005 (1970); Halpern & Cunningham, *Reflections on the New Public Interest Law: Theory and Practice at the Center for Law and Social Policy*, 59 Geo. L.J. 1095 (1971).

² The present inability of the United States Congress to pass a welfare reform law illustrates the interminable delays that are present even when everyone concedes the need for new legislation.

³ *Flast v. Cohen*, 392 U.S. 83, 111 (1968) (Douglas, J., concurring). When

It is not surprising, therefore, that the civil rights movement, which itself sprang to life after the historic court victory in *Brown v. Board of Education*,⁴ placed such heavy reliance upon litigation. Thousands of lawyers and students from around the country converged on the South and, together with attorneys from civil rights organizations, filed countless lawsuits challenging myriad forms of racial segregation.

In addition to the judicial victories it won, the civil rights movement was also instrumental in persuading Congress to pass the various Civil Rights Acts of the 1960's. Those statutes, dealing with discrimination in voting, housing, public accommodations and employment, created federally protected rights and corresponding remedies for their enforcement; and much of the recent public interest litigation has been based on those statutes.

Another factor responsible for the growing volume of litigation involving public interest issues is the liberalization and expansion by the courts of the concept of standing.⁵ Private citizens now have greater access to the judicial system to challenge governmental action, and changes in the rules governing class actions allow such challenges to be raised by individual plaintiffs on behalf of large groups.⁶

Finally, public interest litigation is being spurred by changes in law school curricula,⁷ by the creation and growth of legal aid⁸

state legislatures failed to reapportion themselves to reflect changes in population, resort to the courts was the only avenue for effective relief. See, e.g., *Baker v. Carr*, 369 U.S. 186 (1962). The same has been true in the area of school financing. Although it was recognized that current systems of financing resulted in unequal educational opportunities, see California State Dep't of Educ., *Recommendations on Public School Support* (1967); Coons, Clune & Sugarman, *Educational Opportunity: A Workable Constitutional Test of State Financial Structures*, 57 *Calif. L. Rev.* 305 (1969), the legislative branches failed to act, and litigation became necessary. See, e.g., *Robinson v. Cahill*, Civil No. A-58 (N.J. Apr. 3, 1973); *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971). But see *San Antonio Independent School Dist. v. Rodriguez*, 41 U.S.L.W. 4407 (U.S. Mar. 21, 1973).

⁴ 347 U.S. 483 (1954).

⁵ See text accompanying notes 141-42 *infra*.

⁶ Rule 23 of the Federal Rules of Civil Procedure, which governs class actions, was amended in 1966. For a discussion of the changes in the rule, and the reasons for those changes, see Notes of the Advisory Committee on Rules, in 28 U.S.C. at 7765-68.

⁷ See Nader, *Law Schools and Law Firms*, 54 *Minn. L. Rev.* 493, 497 (1970); Riley, *The Challenge of the New Lawyers: Public Interest and Private Clients*, 38 *Geo. Wash. L. Rev.* 547, 578 (1970).

⁸ Originally, the legal services programs were funded under the community action provision of Title II-A of the Economic Opportunity Act of 1964, §§ 201-11, 78 Stat. 516. Today, however, the Act specifically provides for such services. 42 U.S.C. § 2809(a)(3) (1970). For a discussion of the creation and early growth

and pro bono publico programs, and by the formation of organizations widely referred to as "public interest law firms."⁹ Due to these developments, idealistically motivated young people are able to take courses in law school dealing with such topics as consumer protection or rights of the poor, and upon graduation to utilize this learning to litigate important public issues.

Although public interest litigation has increased, this desirable trend is hampered and threatened by financial considerations. Because public interest lawsuits generally involve complex and often novel issues of both fact and law, they require substantial preparation and expense.¹⁰ At the same time, however, the suits frequently seek injunctive rather than monetary relief and are brought on behalf of clients who lack financial resources. Thus, the attorney who undertakes such litigation can anticipate the expenditure of considerable time and effort, but cannot hope to be compensated either by his client or by any judgment he may win. It is little wonder, therefore, that so few private attorneys have chosen to litigate public interest issues.¹¹

Yet, if public interest litigation is to increase substantially, the private bar must become more involved. Fortunately, there has been a significant judicial development that may generate this greater participation. It is the increasingly frequent award of attorney's fees to the successful plaintiff in cases involving public interest issues. Since the expansion of public interest litigation may well be contingent on the award of attorney's fees, this article will discuss and explore this important development.¹²

of the program, see Johnson, *The O.E.O. Legal Services Program*, 14 Cath. Lawyer 99 (1968); Note, *Neighborhood Law Offices: The New Wave in Legal Services for the Poor*, 80 Harv. L. Rev. 805, 806 (1967). The number of Legal Services attorneys rose to 1800 in 1972. See N.Y. Times, Feb. 2, 1972, at 1, cols. 2-3.

⁹ See Halpern & Cunningham, *supra* note 1; notes 23, 26 & 30 *infra*.

¹⁰ Nearly a decade ago, it was estimated that the cost of a civil rights suit involving a trial, appeal and petition for certiorari was \$15,000 to \$18,000. 110 Cong. Rec. 6541 (1964) (remarks of Senator Humphrey). The costs in *Brown v. Board of Education* were over \$200,000. *Id.*

¹¹ See *NAACP v. Button*, 371 U.S. 415, 444 (1963); Baird, *Charitable Deductions for Pro Bono Publico Professional Services: An Updated Carrot and Stick Approach*, 50 Tex. L. Rev. 441, 441-42 (1972); Riley, *supra* note 7, at 568.

¹² The award of attorney's fees in public interest litigation is also relevant to the broader question whether this country should revise its general policy of not awarding attorney's fees to the prevailing party. That issue, however, is beyond the scope of this article and has already received wide discussion. See, e.g., C. McCormick, *Damages* 255-59 (1935); Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 Calif. L. Rev. 792 (1966) [hereinafter Ehrenzweig, *Reimbursement*]; Kuenzel, *The Attorney's Fee: Why Not A Cost of Litigation?*, 49 Iowa L. Rev. 75 (1963); Stoebuck, *Counsel Fees Included in Costs: A Logical Development*, 38 U. Colo. L. Rev. 202 (1966).

II

THE IMPORTANCE OF AWARDING ATTORNEY'S FEES IN
PUBLIC INTEREST LITIGATION*A. Defining "Public Interest" Litigation*

It will be useful at the outset to define what we mean by litigation that is in the "public interest." In a sense, of course, all lawsuits, except those that are manufactured or totally frivolous, are in the public interest to the extent that society benefits by having differences resolved by the rule of law rather than by self-help. But obviously, when we refer to "public interest" litigation we have in mind only a fraction of the controversies that are submitted for judicial determination.

As with any definition, the attempt to define "public interest" litigation is beset with difficulties. A formulation that is too general is of no value; yet, the definition must be broad and flexible so as to be meaningful in a rapidly changing society. Because of these difficulties it is more fruitful and useful not to attempt a precise definition of "public interest" litigation, but instead to identify those characteristics that are common to lawsuits which most people would classify as in the public interest.

The first of these characteristics is that the issues involved are currently regarded as being of extreme importance. Their significance may be inferred from the fact that the issues, such as environmental or consumer protection, have been the recent subject of considerable legislative and public concern. In other cases, the issues, such as the right to welfare benefits or to have an abortion performed, may go to the very essence of life itself. Finally, the issue may involve a right specifically protected by the Constitution, such as the right to vote, or the freedom of speech or religion.

The second characteristic of public interest litigation is that the final judgment will affect not only the plaintiffs who initiated the action, but a substantial number of other individuals as well. For example, in an environmental suit to enjoin the polluting of a river, the outcome will determine whether all persons who presently live near or use the river, and future generations of such persons, will have an unspoiled body of water to utilize and enjoy.

Only certain lawsuits have such broad impact. If the suit is brought as a class action, the decision will automatically affect all members of the class. Such lawsuits are highly desirable because they avoid a multiplicity of actions over the same issue and thus save the courts and the public considerable time and expense.

But a lawsuit may have a broad impact even though it is not a class action. This will be true where, as a practical matter, the decision affects all persons whose circumstances are similar to those of the named plaintiffs. In some instances this may occur because of the principle of *stare decisis*. For example, if a state statute denying college students the right to vote where they attend school were declared unconstitutional by the United States Supreme Court, that decision would affect the voting rights of all those attending college in the state, even though the suit had not been brought as a class action. In other instances, although *stare decisis* will not apply, the lawsuit may have a broad impact because of its deterrent effect. For example, in a civil rights action filed by a single individual to recover damages for police brutality, an award to the plaintiff might well affect the manner in which the police treat all persons in the community.

The final characteristic of public interest litigation is that it is brought by a private plaintiff rather than by a governmental agency. It does not matter whether the plaintiff is an individual, a group of persons or an organization; the crucial element is that the plaintiff does not have an obligation under the law to initiate the type of lawsuit that has been brought.

Public interest litigation, in sum, unlike most lawsuits, is not aimed at resolving private differences between the named plaintiff and the named defendant. Rather, such litigation is brought by private plaintiffs in the hope of achieving broader results by litigating issues of extreme current importance which when resolved will affect substantial numbers of people.

B. Impediments to Public Interest Litigation

It is crucial in a democratic society that effective channels be provided and maintained for the lawful resolution of conflicts that involve important issues and affect large segments of the population. Public interest litigation is one such channel, but it is often blocked by financial impediments. Such litigation is frequently complex and often involves novel legal concepts. The attorney who handles such a case may be required to expend a great deal of time and energy,¹³ and will expect a fee commensurate with his efforts. Unfortunately, few individuals can afford

¹³ See Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 Colum. L. Rev. 612, 619 (1970). In many environmental protection cases, for example, before the merits of the case can be reached, the plaintiffs are required to litigate exhaustively the issue of standing. See, e.g., *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966).

such fees, and because the relief sought in public interest litigation is often injunctive rather than monetary, it is impossible for an attorney to take the case on a contingent basis. As one court recently noted in an employment discrimination case:

The prosecution of the kind of case involved here . . . "is an enterprise on which any private individual should shudder to embark." . . . Because the probability of a large damage recovery is remote . . . plaintiffs or their lawyers who bring class actions seeking to preserve civil liberties usually must make substantial financial sacrifices. In addition, a lawyer . . . is likely to suffer social, political and community ostracism Even more damaging . . . is the probability that he will be estranged from other members of his profession who are unwilling to participate in, or even lend moral support to, suits seeking to vindicate the public good.¹⁴

It is not surprising, therefore, that "private . . . lawyers generally spurn involvement"¹⁵ in such cases. As a result, most important public interest litigation in recent years has been brought by the federally funded Legal Services Program, and by a few private organizations such as the Legal Defense Fund, the American Civil Liberties Union and the Sierra Club. But even these groups are severely restricted in their efforts to engage in public interest litigation. The Legal Services Program is a fraction of the size it should be, and as a result its attorneys are faced with staggering caseloads which limit their ability to litigate public interest issues.¹⁶ In addition, because only persons from the lowest rungs on the economic ladder can be represented, Legal Services attorneys have but a limited opportunity to litigate important issues that affect wage-earners and middle-income peo-

¹⁴ NAACP v. Allen, 340 F. Supp. 703, 710 (M.D. Ala. 1972).

¹⁵ *Id.*

¹⁶ "[T]he most serious national legal problem of the poor is the over-extended caseload in legal services programs." Clark, Legal Services Programs—The Caseload Problem, or How to Avoid Becoming the New Welfare Department, 47 J. Urban L. 797, 798 (1970). In 1968, for example, although 16.5% of the population—3.3 million persons—fell below the federal poverty level, there were fewer than 1600 Legal Services lawyers, or approximately one attorney for every 20,000 persons. Silver, The Imminent Failure of Legal Services for the Poor: Why and How to Limit Caseload, 46 J. Urban L. 217 (1969). As a result, "it is physically impossible for legal services, legal aid and other programs established to give civil legal assistance to the poor to serve all, or even a majority, of those unable otherwise to afford legal representation." *Id.*

It was estimated that the cost of providing legal services to the poor in 1968 would be \$250,000,000. See Hearings on S. 1545 Before the Subcomm. on Employment, Manpower, and Poverty of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess., pt. 9, at 2905 (1967). The American Bar Association urged Congress to appropriate \$90,000,000. *Id.* at 2909. Yet, by 1972, the budget for Legal Services was only \$70,000,000. 2 OEO Digest, Jan. 1972, at 8.

ple.¹⁷ Finally, the continued existence of the federally financed Legal Services Program always remains in doubt since, like all government programs, it is subject to the tides of politics.¹⁸

The private organizations that engage in public interest liti-

¹⁷ The Guidelines for Legal Services Programs state that the eligibility standard "should not be so high that it includes clients who can pay the fee of an attorney without jeopardizing their ability to have decent food, clothing and shelter." 1 CCH Poverty L. Rep. ¶ 6700.35 (1968). In the first year Legal Services was in operation, the average income level for eligibility was \$2200 for a single person and \$3360 for a family of four. In some rural areas, the eligibility figure was as low as \$1200 for a single individual and \$2000 for a family of four. OEO, Justice: First Annual Report of the Legal Services Program to the ABA, Aug. 1966, at 9, reprinted in 1 CCH Poverty L. Rep. ¶ 7300.72 (1970). In 1969, OEO Income Poverty Guidelines were \$1800 for a single person in nonfarm areas; for a family of four, the guidelines were \$3600 in a nonfarm area and \$3000 in a farm area. *Id.* ¶ 10,770.

¹⁸ Legal Services has already been highly controversial and has antagonized numerous politicians. See Arnold, *Witlier Legal Services*, *Juris Doctor*, Feb. 1971, at 3. As President Nixon has recognized, the program is subject to political pressures and has been the target of considerable political interference. See Lenzner, *Legal Services Fights For the Poor, But Who Fights For Legal Services?*, *Juris Doctor*, Feb. 1971, at 9. Opponents have tried several times to weaken or kill Legal Services. In 1969, for example, ex-Senator Murphy of California introduced an amendment to the Economic Opportunity Act, reprinted in 115 Cong. Rec. 29,894 (1969), that would have given governors a final veto to end or curtail legal services programs in their states. The amendment was subsequently defeated.

There have also been attempts to "regionalize" or "decentralize" Legal Services, see 1 CCH Poverty L. Rep. ¶ 6721 (1970), though ultimately the plans have been withdrawn. See Sullivan, *Law Reform and the Legal Services Crisis*, 59 *Calif. L. Rev.* 1, 25-26 (1971).

In December 1970, Governor Reagan vetoed the grant of the California Rural Legal Assistance, Inc. program (CRLA). He charged that there had been deliberate violations of federal regulations as documented in the California Office of Economic Opportunity Report, *A Study and Evaluation of CRLA, Inc.* (1971). See *N.Y. Times*, Dec. 28, 1970, at 22, col. 3. CRLA responded in its Report to the Office of Economic Opportunity (1971). A commission of three state supreme court judges was appointed, and it exonerated the program. See Report of OEO Commission on CRLA, Inc. Submitted to the Hon. Frank Carlucci, June 25, 1971. OEO finally overrode Governor Reagan's veto and refunded CRLA, but certain restrictions were placed on its operations. See 1 CCH Poverty L. Rep. ¶ 6725. For a discussion of the entire incident, see Bennett & Reynoso, *California Rural Legal Assistance: Survival of a Poverty Law Practice*, 1 *Chicano L. Rev.* 1 (1972). Vice-President Agnew has also criticized the program. See, e.g., *N.Y. Times*, Feb. 3, 1972, at 1, col. 2; *id.*, Apr. 20, 1972, at 14, col. 4. For a general discussion of the past attempts to kill or curtail Legal Services, see Sullivan, *supra* at 24-28.

Opponents of Legal Services are persistent, and the latest rumors are that they plan again to decentralize the program by replacing the Office of Legal Services with a national corporation that will operate during a transition period while separate corporations are established in all fifty states and funded through revenue sharing. Supporters of Legal Services feel this plan would subject the program to political controls. Some legislation is needed, however, because it is unlikely that the Office of Economic Opportunity will exist beyond the present fiscal year. But proponents of Legal Services hesitate to introduce strong legislation for fear that the President will veto it and let the program die. See *N.Y. Times*, Mar. 12, 1973, at 16, col. 2.

gation are also severely restricted in their activities, primarily by financial factors. Groups like the ACLU or the Sierra Club are dependent on grants from foundations and on private donations from thousands of small contributors. These funds must be used for a host of activities other than litigation and there is no certainty from year to year as to the level of contributions that will be received. During periods of economic recession it is especially difficult for small contributors to donate, yet it is precisely during such times that the need for public interest litigation may be greatest. Moreover, the volume of donations is largely dependent on provisions in the tax laws concerning charitable contributions¹⁹ and the very existence of organizations which must rely on such donations often seems to hang by a thread on the whims of the Internal Revenue Service.²⁰

But even if the attorneys employed by Legal Services and by private organizations could handle all the public interest litigation that should be brought, it is unhealthy in a democratic society for so few members of the legal profession to be the only ones involved in litigating important public issues. For decades the profession has devoted its best talents to serving wealthy individuals and large corporations, while generally ignoring the interests and needs of the average citizen.²¹ Such behavior in the

¹⁹ See *N.Y. Times*, Oct. 9, 1970, at 1, col. 5; Garrett, *Federal Tax Limitations of Public Interest and Educational Organizations*, 59 *Geo. L.J.* 561, 561-62 (1971). Donors are allowed under Section 170(c) of the Internal Revenue Code to deduct from their income, within certain limits, the contributions they make to institutions that qualify under Section 501(c) (3) of the Code.

²⁰ For example, on Oct. 9, 1970, the IRS temporarily suspended "the issuance of rulings on claims for tax-exempt status by 'public interest law firms' and other organizations which litigate or support litigation for what they determine to be the public good in some chosen area of national interest. . . ." News Release, IR-1069. There was an immediate public outcry against this move, see, e.g., Editorial, *N.Y. Times*, Oct. 15, 1970, at 46, col. 2, and Senate hearings were scheduled. On Oct. 15, 1970, the IRS modified its original decision with respect to organizations that had previously received favorable rulings, but left a cloud over new grants to such organizations. See News Release, IR-1072. Finally, on Nov. 12, 1970, the IRS resumed issuing rulings regarding public interest law firms and published guidelines under which those rulings would be made. News Release, IR-1078. For background material on this controversy, including relevant IRS news releases, see *Hearings on Examination of Internal Revenue Service Decision to Deny Tax-Exempt Status to Charitable Organizations Which Engage in Litigation Affecting Poverty Programs Before the Subcomm. on Employment, Manpower, and Poverty of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 2d Sess. 5-53 (1970) [hereinafter *Hearings*]. For an analysis of the legal issues involved in granting tax-exempt status to public interest organizations, see Corrigan, *Public Interest Law Firms Win Battle With IRS Over Exemptions, Deductions*, 2 *Nat'l J.* 2541 (1970); Garrett, *supra* note 19, at 575-77.

²¹ In 1969, it was estimated that, assuming the ratio of lawyers to the total population was adequate, there should be 49,000 lawyers serving the 16.5% of the

long run can only lead to suspicion on the part of the public and eventually to sweeping reforms.²²

It is not that attorneys have less social conscience than do other professional people; and undoubtedly many lawyers in private practice would welcome and enjoy an opportunity to intersperse civil rights or consumer protection suits, for example, among their usual personal injury and estate cases. Moreover, our largest law firms would be only too happy to offer the prospect of public interest litigation as an inducement to the many bright young attorneys who today reject their offers because they are not eager to engage in a strictly commercial practice.²³ Unfortunately, however, the private bar has been deterred from public interest litigation by the knowledge that such cases do not generate attorney's fees. Equally unfortunate is the fact that at a time when law schools, in response to student demands, have altered their curricula to include courses in areas such as poverty law, many graduates are unable to pursue careers in those fields simply because they cannot earn a living doing so.²⁴

One positive note that has been sounded recently is the es-

population—some 33,000,000 persons—who fell below the federal poverty level of \$3000 per year for a family of four. See Silver, *supra* note 16, at 217. Yet of the 296,000 lawyers in the country, not more than 4000 served the poor. *Id.* It has been estimated that 70% of all the lawyers in the United States serve the 25% of the population whose median incomes exceed \$10,000 a year. *Id.* at 218.

²² See, e.g., Dolan, *Lawyers and the Class Struggle*, *Juris Doctor*, Apr. 1971, at 34, in which the author suggests that the legal profession be nationalized.

²³ In fact, in recent years many of the largest and most prestigious law firms have established pro bono publico programs. See Nader, *Law Schools and Law Firms*, 54 *Minn. L. Rev.* 493, 497-98 (1970). Although one suspects that these programs have been set up primarily as "carrots" to be dangled before younger attorneys who are disenchanted with big firm practice, nevertheless they have produced some significant public interest litigation. But most pro bono programs have serious shortcomings. Often they consist of no more than a statement by the firm that its members are free to handle pro bono matters in their "spare time." Even when pro bono cases are assigned in lieu of other matters, it is frequently only the youngest and least experienced attorneys in the firm who work on them. Pro bono work is often not incorporated into the regularized procedures of the firm and as a result the attorneys handling these matters do not receive the same supervision they ordinarily do, and fail to develop any expertise in the area. Since advancement is usually dependent upon the attorney's performance for the firm's paying clients, pro bono work generally takes the back seat when the attorney is forced to allocate his time. Finally, and most importantly, even the best pro bono programs involve only a few lawyers and a relatively small percentage of the firm's energies, since no large firm will devote a significant portion of its resources to cases that are not fee-generating. Thus, pro bono programs are relatively unimportant as far as the future of public interest litigation is concerned. For a general discussion of pro bono programs, see ABA Section of Individual Rights and Responsibilities, *The Private Law Firm and Pro Bono Publico Programs: A Responsive Merger* (1971).

²⁴ See Note, *Allowance of Attorney's Fees in Civil Rights Actions*, 7 *Colum. J. of Law & Soc. Prob.* 381, 409 (1971).

establishment of a number of public interest law firms, designed to engage in important public interest litigation that offers no possibility of financial remuneration. Such firms, however, are still few in number and face several major obstacles, the most important of which is the problem of funding.²⁵ These firms rely for the most part on grants from private foundations,²⁶ but other sources of income must be found, for

[w]hile foundations have in the past supported a few [public interest law firms], it is not anticipated that this source of funding will continue indefinitely or that it will be sufficient to meet the nation-wide need.²⁷

Moreover, securing funding from private foundations "is a terrible burden. It can be a full-time job for one person."²⁸ Thus, a great deal of the public interest lawyer's time and attention is diverted from the important legal work in which he should be engaged. Finally, foundations may place explicit or implicit conditions on the use of funds, thereby rendering the attorney less effective in his advocacy.²⁹ For all of these reasons, if public interest law firms are to remain alive and proliferate, other sources of funds must be found. Jean and Edgar Cahn have stated the problem well:

The current crop of public interest law firms are essentially hot-house flowers. They are the product of limited, short-term foundation largesse. A major and as yet unanswered question for these new public interest law firms is that of economic viability. . . . The question of economic viability makes it critically important to ask whether it is possible to institutionalize career lines which permit lawyers who desire to live on a better than subsistence level to

²⁵ Hearings, *supra* note 20, at 216 (statement of Charles R. Halpern, Director, Center for Law and Social Policy); Halpern & Cunningham, *supra* note 1, at 1112.

²⁶ Public Advocates, Inc., of San Francisco is funded by six foundations. The grants are on a short-term basis with the understanding that Public Advocates will attempt to become self-supporting through the judicial award of attorney's fees in the public interest cases it litigates.

The Center for Law and Social Policy in Washington, D.C. is funded by the Ford Foundation, while the Stern Community Law Firm, also in Washington, was established with the help of the Philip M. Stern Family Fund. For a description of the Center for Law and Social Policy, see Halpern & Cunningham, *supra* note 1, at 1102-06; Shay, *The Public Interest Law Firm*, *Juris Doctor*, Apr. 1971, at 28.

²⁷ Hearings, *supra* note 20, at 199 (memorandum submitted by Charles R. Halpern, Director, Center for Law and Social Policy, and Mitchell Rogovin, Vice-chairman, Board of Trustees, Center for Law and Social Policy); see Berlin, Roisman & Kessler, *Public Interest Law*, 38 *Geo. Wash. L. Rev.* 675, 686-87 (1970); Halpern & Cunningham, *supra* note 1, at 1112.

²⁸ Hearings, *supra* note 20, at 195 (testimony of Charles R. Halpern).

²⁹ All of these problems, it should be noted, are also present if the source of funding is the government rather than private foundations.

engage substantially or exclusively in work on behalf of clients who pay little or nothing.³⁰

C. Eliminating the Financial Impediments

As the preceding discussion has indicated, economic factors are the most serious obstacle to the continued growth of public interest litigation. Such lawsuits are complex and time consuming, yet offer the attorney little prospect of financial remuneration. This dilemma can be solved, however, by awarding attorney's fees, as a matter of course, to private plaintiffs who successfully litigate important public issues that affect a substantial segment of the population. The award of attorney's fees will enable the newly established public interest law firms to become self-supporting, thereby institutionalizing the career lines of public interest lawyers. But more importantly, the award of attorney's fees will make it financially possible for all attorneys—whether sole practitioners or members of large law firms—to include public interest cases as a regular part of their practice. Only such wide-scale involvement by the private bar can insure that all important public issues will be litigated.

Fortunately, our judicial system has been sensitive to the problems involved in financing public interest litigation and in recent years the courts have increasingly awarded attorney's fees in such cases. It is to this significant development that we now turn.

III

THE POWER OF THE COURTS TO AWARD ATTORNEY'S FEES

At first blush it may seem quite extraordinary that courts have awarded fees to successful plaintiffs in public interest litigation, for it is well-known that the traditional rule in the United States has been that attorney's fees are not awarded to the prevailing party. What is not well-known, however, is that this custom is apparently unique to our country³¹ and represents a

³⁰ Cahn & Cahn, *supra* note 1, at 1007-08.

³¹ Ehrenzweig, *Shall Counsel Fees Be Allowed?*, 26 Cal. S.B.J. 107, 109-10 (1951); Ehrenzweig, *Reimbursement*, *supra* note 12, at 793. All other major nations seem to award attorney's fees to the prevailing party. See, e.g., Baeck, *Imposition of Fees of Attorney of Prevailing Party Upon the Losing Party Under the Laws of Austria*, 1962 Proceedings of ABA Section of International and Comparative Law 119 (1962); Baeck, *Imposition of Legal Fees and Disbursements of Prevailing Party Upon the Losing Party—Under the Laws of Switzerland*, *id.* at 124; Dietz, *Payment of Court Costs by the Losing Party Under the Laws of Hungary*, *id.* at 131; Freed, *Payment of Court Costs by the Losing Party in France*, *id.* at 126; Schima, *The Treatment of Costs and Fees of Procedure in the Austrian Law*, *id.* at 121.

departure from common law practices. In addition, exceptions to the general rule have been applied by our courts in a wide variety of cases.

The English, from whom we derive our legal system, have long awarded attorney's fees³² to the successful litigant. In the courts of equity, the authority to award fees was apparently an inherent power of the Lord Chancellor and entirely within his discretion.³³ In the courts of law, on the other hand, the award of fees was based completely on statute and dates back at least to the Statute of Marlborough in 1267,³⁴ which authorized attorney's fees to be awarded to the prevailing tenant-defendant in certain actions maliciously brought by a landlord.³⁵ The first statute to sanction the award of fees to a plaintiff was the Statute of Gloucester in 1275,³⁶ and by the year 1607³⁷ successful defendants were entitled to their fees in all actions where a plaintiff could recover them if he won.³⁸ Thus, at the time England established her first colonies in America, and throughout the period of English colonial rule, courts in the mother country awarded attorney's fees to the successful litigant as of right.³⁹

The question of why the courts in this country adopted a different practice has been the topic of much conjecture and debate. One scholar has suggested that during colonial times the state of the law was such that it was generally considered unnecessary to retain an attorney, and since lawyers were generally held in suspicion, the courts did not wish to encourage the use of attorneys by awarding them fees.⁴⁰ But another writer has argued

³² In England, the term "fees" refers to sums paid by a litigant to an officer of the court, while "costs" are the expenses of litigation that one party has to pay to the other. See Goodhart, *Costs*, 38 *Yale L.J.* 849 (1929). In the United States, the terms have exactly the opposite meanings. This article will use the terms with their American connotations.

³³ *Id.* at 854.

³⁴ 52 Hen. III, c. 6.

³⁵ See 2 F. Pollock & F. Maitland, *History of English Law* 597 (2d ed. 1898).

³⁶ 6 Edw. I, c. 1.

³⁷ 4 Ja. I, c. 3.

³⁸ The statutes cited above dealt with the award of fees in the original action. Beginning in 1487, a series of laws was enacted that authorized the award of fees on appeal. See Goodhart, *supra* note 32, at 853 n.26.

³⁹ Fees continued to be awarded as of right in England until 1875. In that year, Order 55 of the Rules of Court, attached as First Schedule to the Supreme Court of Judicature Act, 38 Vict., c. 77, provided that with certain exceptions, attorney's fees were to be awarded in the discretion of the court. That remains the rule in England today. For a discussion of how fees are awarded in England, see Goodhart, *supra* note 32, at 854-60; Stoebe, *supra* note 12, at 204-07.

⁴⁰ See Goodhart, *supra* note 32, at 873, citing Warren, *A History of the American Bar* 4 (1913).

that the English rule regarding fees was not adopted in this country because of the rugged individualistic spirit of our early settlers. That spirit manifested itself in the doctrine that each person should bear whatever financial burdens were involved in litigation and that attorney's fees therefore should not be awarded to the winner.⁴¹

There is also the widely held view that the English rule was rejected in this country because it was undemocratic. According to this view, awarding attorney's fees to the prevailing party discriminates against the poor because they are discouraged from using the courts, knowing that if they are unsuccessful they will have to pay for their opponent's counsel, as well as for their own.⁴²

Finally, Professor Ehrenzweig has propounded still a different explanation, contending that the American rule developed more or less by accident:

[T]he rule is not founded on some age-old principle of the common law or a peculiar psychology of the American people; but . . . it is the result of a more or less accidental statutory history. Indeed, there are good reasons for assuming that what is now so often represented as a noble postulate for restraint of the winner in a chance contest, is actually due to the simple fact that the New York legislature in 1848, in attempting to perpetuate what it considered a sound legal rule of recovery of attorneys' fees by the prevailing party, made the fatal mistake of fixing the amount recoverable in dollars and cents rather than in percentages of the amount recovered or claimed. It was this mistake probably that caused lawyers and courts, when rising costs began to obscure the real purpose of the statutory amounts of costs gradually to forget the meaning of those amounts. And it was this process of gradual forgetting rather than a deep-seated moral argument that has apparently caused the abolition of the prevailing party's right to the recovery of his counsel fees.⁴³

Perhaps the uncertainty as to why attorney's fees generally are not awarded in this country helps to explain the fact that our courts have never thought themselves inextricably bound to deny fees. The federal judiciary has traditionally viewed the allowance of attorney's fees as part of its "historic equity jurisdiction,"⁴⁴

⁴¹ See Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 *Vand. L. Rev.* 1216, 1220-21 (1967).

⁴² See *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967).

⁴³ Ehrenzweig, *Reimbursement*, *supra* note 12, at 798-99. See generally McCormick, *supra* note 12, at 234-36; Goodhart, *supra* note 32, at 874.

⁴⁴ *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 164 (1939), quoted with approval in *Vaughan v. Atkinson*, 369 U.S. 527, 530 (1962). See *Hall v. Cole*, 41

and both federal and state courts have long exercised their equitable power to award fees to successful plaintiffs in a wide variety of circumstances, but especially in three main categories of cases.

A. Common Fund Cases

Attorney's fees have long been awarded to the successful plaintiff in cases where he, having a common interest with others, maintains a suit at his own expense which results in the creation or preservation of a fund in which all those having a common interest share.⁴⁵ The award of fees in these "common fund" cases was approved by the Supreme Court nearly ninety years ago in the landmark case of *International Improvement Fund v. Greenough*⁴⁶ where the Court allowed the award of attorney's fees incurred in prosecuting a suit to reclaim and rescue a trust fund. The creditor-plaintiff had filed the suit on behalf of all the bondholders, and the Court held that it would be unfair for him to bear all the costs of litigation while the others, who benefited equally by the suit, incurred no legal expenses at all. The plaintiff was therefore entitled to receive reimbursement for his attorney's fees from the fund he had rescued, or a proportional contribution from those who accepted the benefit of his efforts.

The award of fees to the successful plaintiff in common fund situations was expanded by the Supreme Court in *Sprague v. Ticonic National Bank*.⁴⁷ There the plaintiff obtained a lien on certain earmarked funds of an insolvent bank. Although his suit was not a class action, the principle of stare decisis operated to establish the right of other depositors to obtain similar liens on the same funds. The Supreme Court ruled that justice required the district court to exercise its equitable powers and grant the plaintiff his attorney's fees from the earmarked funds.⁴⁸

U.S.L.W. 4658, 4659 (U.S. May 21, 1973). For a detailed discussion of the equitable power of federal courts to grant attorney's fees, see *Guardian Trust Co. v. Kansas City So. R.R.*, 28 F.2d 233, 240-46 (8th Cir. 1928), rev'd on other grounds, 281 U.S. 1 (1930); Annot., Prevailing Party's Right to Recover Counsel Fees in Federal Courts, 8 L. Ed. 2d 894 (1963).

⁴⁵ See generally McCormick, *supra* note 12, at 237-39; Annot., Prevailing Party's Right to Recover Counsel Fees in Federal Courts, 8 L. Ed. 2d 894 (1963).

⁴⁶ 105 U.S. 527 (1882).

⁴⁷ 307 U.S. 161 (1939).

⁴⁸ For recent examples of the award of fees in common fund cases, see *Gibbs v. Blackwelder*, 346 F.2d 943 (4th Cir. 1965); *Bebchick v. Public Util. Comm'n.*, 318 F.2d 187 (D.C. Cir.), cert. denied, 373 U.S. 913 (1963); *Walsh v. National Savings & Trust Co.*, 247 F.2d 781 (D.C. Cir. 1957); *Washington Gas Light Co. v. Baker*, 195 F.2d 29 (D.C. Cir. 1951); Annots., 5 A.L.R.2d 874 (1949), 107 A.L.R. 749 (1937), 49 A.L.R. 1149 (1927).

B. Shareholder Derivative Suits

The courts have also applied an offshoot of the common fund principle in shareholder derivative suits.⁴⁹ Successful plaintiffs are allowed to recover counsel's fees from the defendant corporation in such cases on the theory that where a suit has resulted in a pecuniary benefit to the corporation and all its shareholders, it is only just that the plaintiff's legal expenses be charged to the corporation and thus distributed among all those who own its shares.⁵⁰

But it is clear that attorney's fees can also be awarded in derivative suits where the plaintiff, though successful, has not secured a monetary recovery.⁵¹ The only prerequisite for granting fees in such cases is that the plaintiff's suit result in either a judgment or settlement⁵² that provides a "substantial benefit" for the corporation.⁵³ Thus, attorney's fees have been awarded where the plaintiff succeeded in compelling a corporation to: hold a shareholders' meeting and cancel certain shares;⁵⁴ nullify or declare illegal amendments to the articles of incorporation⁵⁵ or bylaws;⁵⁶ or refrain from entering into certain employment contracts or from granting stock options.⁵⁷ It is sufficient for the

⁴⁹ See Annot., Attorney's Fees and Other Expenses Incident to Controversy Respecting Internal Affairs of Corporation as Charge Against the Corporation, 39 A.L.R.2d 580 (1955).

⁵⁰ See *Hutchinson Box Board & Paper Co. v. Van Horn*, 299 F. 424 (8th Cir. 1924).

⁵¹ While the state courts had long recognized their power to award attorney's fees in shareholder derivative suits where the successful plaintiff had not secured a monetary recovery, the United States Supreme Court did not sanction the award of fees in such cases until *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970). See Note, The Allocation of Attorney's Fees After *Mills v. Electric Auto-Lite Co.*, 38 U. Chi. L. Rev. 316, 326 (1971). For a discussion of the *Mills* case and its importance for the award of attorney's fees in public interest litigation, see text accompanying notes 78-83 *infra*.

⁵² See *Fletcher v. A.J. Industries, Inc.*, 266 Cal. App. 2d 313, 325, 72 Cal. Rptr. 146, 153 (1968).

⁵³ See *id.* at 320, 72 Cal. Rptr. at 150. In *Mills v. Electric Auto-Lite Co.* the United States Supreme Court stated that:

[a]lthough the earliest cases recognizing a right to reimbursement involved litigation that had produced or preserved a "common fund" for the benefit of a group, nothing in these cases indicates that the suit must actually bring money into the court as a prerequisite to the court's power to order reimbursement of expenses.

396 U.S. 375, 392 (1970).

⁵⁴ *Mencher v. Sachs*, 39 Del. Ch. 366, 164 A.2d 320 (1960).

⁵⁵ *Berger v. Amana Society*, 253 Iowa 378, 387-88, 111 N.W.2d 753, 758 (1961).

⁵⁶ *Bosch v. Meeker Cooperative Light & Power Ass'n*, 257 Minn. 362, 101 N.W.2d 423 (1960).

⁵⁷ *Richman v. DeVal Aerodynamics, Inc.*, 40 Del. Ch. 548, 185 A.2d 884 (1962).

award of attorney's fees that the plaintiff's suit "‘maintain[s] the health of the corporation and raise[s] the standards of ‘fiduciary relationships and of economic behavior,’" or ‘prevent[s] an abuse which would be prejudicial to the rights and interests of the corporation or affect[s] the enjoyment or protection of an essential right to the stockholder's interest.’"⁵⁸

In all such cases, the award of fees is not based on a common fund theory since no fund has been recovered. Rather, the successful plaintiff is awarded attorney's fees because to do so encourages shareholder policing of corporate action through derivative suits and is thus in the public interest.⁵⁹ As George Hornstein, a prominent writer in the field of derivative suits, noted over thirty years ago:

If reimbursement were not permitted to a stockholder successfully prosecuting a suit to redress a wrong to his corporation, the practical effect would be the same as if the suits were prohibited and the small stockholder remediless. . . . Yet it is to the interest of society that the stockholder not only be permitted to bring suit on behalf of his corporation, but that he be encouraged to take the initiative. Assuring a stockholder that, if successful, he will not be obliged personally to pay the entire cost of the suit is hardly too much inducement.⁶⁰

This rationale has been found to be equally applicable in what may be termed "union derivative suits."⁶¹ In such cases, union members sue their union or its officers to correct abuses or illegalities in the conduct of the organization's affairs. If the plaintiff is successful, the benefits of the litigation inure not just to him, but to the entire membership. Fees have been awarded to the successful litigant in such cases, even though there is no monetary recovery, because

[i]t is highly important to the public as well as to the union membership that those in control of the administration of the union should not be permitted to exercise their power for selfish and non-democratic purposes. No obstacle should be placed in the path of union members who, acting in good faith, seek the aid of the courts

⁵⁸ *Bosch v. Meeker Cooperative Light & Power Ass'n*, 257 Minn. 362, 365-67, 101 N.W.2d 423, 426-27 (1960), quoted in *Fletcher v. A.J. Industries, Inc.*, 266 Cal. App. 2d 313, 324-25, 72 Cal. Rptr. 146, 153 (1968).

⁵⁹ See *Holthusen v. Edward G. Budd Mfg. Co.*, 55 F. Supp. 945 (E.D. Pa. 1944); *Fletcher v. A.J. Industries, Inc.*, 266 Cal. App. 2d 313, 324, 72 Cal. Rptr. 146, 153 (1968); Hornstein, *The Counsel Fee in Stockholder's Derivative Suits*, 39 Colum. L. Rev. 784, 791-92 (1939).

⁶⁰ Hornstein, *supra* note 59, at 791.

⁶¹ See, e.g., *Rolax v. Atlantic Coast R.R.*, 186 F.2d 473 (4th Cir. 1951); *Murray v. Kelly*, 14 App. Div. 2d 528, 217 N.Y.S.2d 146 (1st Dep't 1961), *aff'd*, 11 N.Y.2d 810, 182 N.E.2d 109, 227 N.Y.S.2d 435 (1962).

in an effort to correct the abuses of power by union officials. . . . The allowance of attorney's fees both in the trial court and on appeal will tend to encourage union members to bring into court their complaints of union mismanagement and thus the public interest as well as the interest of the union will be served.⁶²

C. Improper Conduct Cases

The third broad category of cases in which attorney's fees have traditionally been awarded to the successful plaintiff is where the defendant has engaged in fraudulent, groundless, oppressive or vexatious conduct.⁶³ The traditional reason for awarding fees in such instances is to punish the unsuccessful defendant for his improper behavior and to reimburse the plaintiff for the costs he incurred as a result. This "improper conduct" category has provided the basis for awarding attorney's fees in a large number of school desegregation cases in which the defendants have not made good faith efforts to achieve racial integration.⁶⁴ The Fourth Circuit, in fact, has ruled that where there has been a continued pattern of evasion and obstruction, it is an abuse of equitable discretion *not* to award fees.⁶⁵

IV

THE TREND TOWARD AWARDED ATTORNEY'S FEES IN PUBLIC INTEREST LITIGATION

As the preceding section demonstrates, the equitable power of the courts to award attorney's fees to successful plaintiffs in the absence of specific statutory authorization is both clear and

⁶² *Gilbert v. Local 701, Int'l Union of Operating Eng'rs*, 237 Ore. 130, 390 P.2d 320 (1964). On May 21, 1973, after this article had already gone to press, the United States Supreme Court rendered its first decision involving attorney's fees in a union derivative suit: *Hall v. Cole*, 41 U.S.L.W. 4658 (U.S. May 21, 1973). In its opinion the Court grouped together the common fund cases, and the shareholder and union derivative cases into a category it termed "common benefit" cases. Based on those cases and the inherent equitable power of the federal courts to grant fees when the interests of justice so require, the Court affirmed an award of attorney's fees in a case brought under Section 102 of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 412 (1970). For a fuller discussion of *Hall v. Cole*, see note 83 infra.

⁶³ See, e.g., *Vaughan v. Atkinson*, 369 U.S. 527, 530-31 (1962); *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 441 F.2d 631, 637 (5th Cir. 1971); *Undersea Eng'r & Const. Co. v. International Tel. & Tel. Corp.*, 429 F.2d 543 (9th Cir. 1970); *Dyer v. Love*, 307 F. Supp. 974, 984-88 (N.D. Miss. 1969); cf. *Deem v. Aero Mayflower Transit Co.*, 24 F.R.D. 16 (S.D. Cal. 1959).

⁶⁴ See, e.g., *Nesbit v. Statesville City Bd. of Educ.*, 418 F.2d 1040, 1043 (4th Cir. 1969); *Rolfe v. County Bd. of Educ.*, 391 F.2d 77, 81 (6th Cir. 1968); *Hill v. Franklin County Bd. of Educ.*, 390 F.2d 583, 585 (6th Cir. 1968).

⁶⁵ *Bell v. School Bd.*, 321 F.2d 494, 500 (4th Cir. 1963) (en banc).

broad.⁶⁶ Despite the general rule against granting fees, American courts have exercised their equitable power in cases where the award served not only to compensate the successful party for his costs of counsel, but also to further some social policy. The common fund and shareholder derivative cases involve private parties litigating issues of importance and of benefit to themselves and to a group to which they belong. In such cases, the courts have ordered the entire group to share the burden of paying attorney's fees in order to encourage individuals to litigate such important issues. In the other major category of cases where fees have been awarded—the improper conduct cases—the plaintiff has been forced, because of the defendant's improper behavior, to institute litigation to secure what was plainly owed him. The award of fees in such cases serves to deter such improper behavior and to eliminate unnecessary litigation.

Public interest lawsuits contain characteristics similar to those found in the common fund, shareholder derivative and improper conduct cases. These lawsuits involve private parties litigating issues that are important and beneficial not only to the plaintiff, but also to a wide segment of the public, and often involve misconduct on the part of the defendant as well. These similarities, together with two recent Supreme Court decisions, have produced a trend in the lower federal courts toward awarding attorney's fees in public interest litigation.

A. *The Supreme Court*

The seminal decision in this trend was the opinion of the United States Supreme Court in *Newman v. Piggie Park Enterprises, Inc.*⁶⁷ That case arose under Title II of the Civil Rights Act of 1964,⁶⁸ which provides that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee"⁶⁹ The Court of Appeals for the Fourth Circuit had interpreted that provision as allowing attorney's fees only to the extent that defenses had been advanced "for purposes of delay and

⁶⁶ In addition to the situations discussed above, the courts have also exercised their equitable powers and awarded attorney's fees in a variety of other circumstances. Fees have been allowed, for example, when the conduct of a trustee is incompatible with his fiduciary duty, see, e.g., *Wilmington Trust Co. v. Coulter*, 42 Del. Ch. 253, 208 A.2d 677 (1965); in custody cases, see, e.g., *Rau v. Rau*, 441 P.2d 320 (Wyo. 1968); and in divorce actions, see *McCormick*, *supra* note 12, at 241.

⁶⁷ 390 U.S. 400 (1968) (per curiam).

⁶⁸ 42 U.S.C. § 2000a(c)(2) (1970), prohibiting discrimination in restaurants affecting interstate commerce.

⁶⁹ 42 U.S.C. § 2000a-3(b) (1970).

not in good faith."⁷⁰ The Supreme Court, however, rejected this narrow view and stated:

When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. A Title II suit is thus private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. . . .

[O]ne who succeeds in obtaining an injunction under that Title should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.⁷¹

The *Piggie Park* decision was important for two reasons. In the first place, it indicated a shift from the approach the Court had seemingly adopted only a year before in *Fleischmann Distilling Corp. v. Maier Brewing Co.*⁷² That case involved attorney's fees in a trademark infringement case brought under the Lanham Act.⁷³ Prior to the decision, the lower federal courts had granted fees in such cases,⁷⁴ and generally had been exercising with increasing frequency their equitable power to reimburse the successful plaintiff for his costs of counsel.⁷⁵ Against this background, the Supreme Court chose to take a more restrictive approach to the awarding of fees, and in *Fleischmann* ruled that the absence of a fee-shifting provision in the Lanham Act indicated a congressional intent that attorney's fees should not be awarded to the prevailing party in trademark infringement cases brought pursuant to the statute.

Piggie Park broadened the permissible scope of fee granting by interpreting a discretionary provision for attorney's fees as a virtual command always to award fees to a successful plaintiff, and thereby signaled a change in the Court's position toward a

⁷⁰ 377 F.2d 433, 437 (4th Cir. 1967).

⁷¹ 390 U.S. at 401-02.

⁷² 386 U.S. 714 (1967).

⁷³ 15 U.S.C. §§ 1051-1127 (1970).

⁷⁴ See, e.g., *Wolfe v. National Lead Co.*, 272 F.2d 867, 873 (9th Cir. 1959); *Maternally Yours, Inc. v. Your Maternity Shop, Inc.*, 234 F.2d 538, 545 (2d Cir. 1956).

⁷⁵ See, e.g., *Bell v. School Bd.*, 321 F.2d 494 (4th Cir. 1963) (en banc); *Rolfe v. County Bd. of Educ.*, 282 F. Supp. 192 (E.D. Tenn. 1966), aff'd, 391 F.2d 77 (6th Cir. 1968). See also Note, *The Allocation of Attorney's Fees After Mills v. Electric Auto-Lite Co.*, 38 U. Chi. L. Rev. 316, 320 (1971).

more liberal approach. More importantly, the decision also revealed that the Court did not view the award of attorney's fees simply as a way to punish the losing party for misconduct, as the lower federal courts had previously done,⁷⁶ but instead regarded the award of fees in more positive terms as an effective way of encouraging "private attorneys general" to bring lawsuits that advance the public interest.⁷⁷

This new view was reiterated by the Supreme Court in *Mills v. Electric Auto-Lite Co.*⁷⁸ That case involved a suit brought by minority shareholders charging that a proxy statement sent out by the defendant's management was materially misleading and therefore violated Section 14(a) of the Securities Act of 1934.⁷⁹ That section of the Act, in contrast to other provisions of the same statute, is silent on the question of fees.⁸⁰ Thus, the case was quite analogous to *Fleischmann* and seemed to call for a similar ruling: that fees should not be awarded "in the context of statutory causes of action for which the legislature had prescribed intricate remedies."⁸¹ Instead, the Supreme Court held in *Mills* that the special provisions in the Securities Act which authorized the award of fees should not be interpreted as denying to the courts the power to award fees in suits under other sections of the Act if the circumstances were appropriate. Examining section 14(a), the Court, borrowing the theories of George Hornstein, found that

private stockholders' actions of this sort "involve corporate therapeutics," and furnish a benefit to all shareholders by providing an important means of enforcement of the proxy statute.⁸²

Thus, concluded the Court, special circumstances exist to justify the award of attorney's fees in suits brought under section 14(a).⁸³

⁷⁶ See, e.g., *Bell v. School Bd.*, 321 F.2d 494 (4th Cir. 1963) (en banc).

⁷⁷ 390 U.S. at 402.

⁷⁸ 396 U.S. 375 (1970). For a detailed discussion of the *Mills* opinion, see Note, *The Allocation of Attorney's Fees After Mills v. Electric Auto-Lite Co.*, 38 U. Chi. L. Rev. 316 (1971).

⁷⁹ 48 Stat. 895 (1934), as amended, 15 U.S.C. § 78n(a) (1970).

⁸⁰ Sections 9(e) and 18(a) of the Act specifically provide for fee shifting. 15 U.S.C. §§ 78i(e), 78r(a) (1970).

⁸¹ 386 U.S. at 719.

⁸² 396 U.S. at 396.

⁸³ The Court distinguished *Fleischmann* on the ground that the Lanham Act, in contrast to the Securities Act, "'meticulously detailed the remedies available to a plaintiff.'" 396 U.S. at 391. *Fleischmann* was similarly distinguished by the Court in *Hall v. Cole*, 41 U.S.L.W. 4658 (U.S. May 21, 1973), a case involving attorney's fees under the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 401 et seq. (1970). In that case, decided after this article had already gone to press, the plaintiff had introduced at a union meeting a set of resolutions alleging

The *Mills* decision is both consistent with and goes beyond the *Piggie Park* holding. The opinions are consistent in that both are based not on a negative theory of punishing wrongdoers, but rather on a positive concept of encouraging socially desirable litigation. *Mills* goes beyond *Piggie Park*, however, because it involved a statute that was silent on the question of granting attorney's fees to successful plaintiffs, while *Piggie Park* dealt with a statute that permitted an award in the court's discretion. Read together, the two cases stand for the broad principle that attorney's fees should be granted to successful plaintiffs in order to effectuate important social policies. We will refer to this principle as the "*Piggie Park-Mills* doctrine."

B. The Lower Federal Courts

This new approach of the Supreme Court has not passed unnoticed by the lower federal courts, which began soon after *Piggie*

various instances of undemocratic actions and shortsighted policies by the union's officers. He was subsequently expelled on the ground of "deliberate and malicious vilification" of the union leadership. After exhausting intra-union remedies, plaintiff initiated a suit under Section 102 of the LMRDA, 29 U.S.C. § 412 (1970), and was ultimately reinstated and awarded attorney's fees.

The Supreme Court, in a very strong opinion, affirmed the award of those fees on the basis of what it termed a "'common benefit' rationale." 41 U.S.L.W. at 4659 n.7. The Court found that plaintiff, by vindicating his own right of free speech guaranteed by the LMRDA, had rendered a substantial benefit to the union and all its members. Reimbursement to plaintiff of his attorney's fees out of the union treasury simply shifted the costs of litigation to the class that benefited from it. The award of attorney's fees under Section 102 of the LMRDA fell "squarely within the traditional equitable power of federal courts to award such fees whenever 'overriding considerations indicate the need for such recovery.' *Mills v. Electric Auto-Lite Co.*" 41 U.S.L.W. at 4660.

Because of its conclusion with respect to the award of fees under the "common benefit" rationale, the Court specifically found it unnecessary to consider whether plaintiff was entitled to fees under a "private attorney general" theory. 41 U.S.L.W. at 4659 n.7. That theory, however, was employed by the Court a few weeks later in its *per curiam* opinion in *Northcross v. Memphis Bd. of Educ.*, 41 U.S.L.W. 3635 (U.S. June 4, 1973). The question presented in that case was whether the Court of Appeals for the Sixth Circuit had acted improperly when it denied attorney's fees to the successful plaintiffs in a school desegregation suit brought under Section 718 of the Emergency School Aid Act of 1972, 86 Stat. 235. The discretionary language in that section tracked the wording of Title II of the 1964 Civil Rights Act, which the Court had previously interpreted in *Piggie Park* to be a virtual command to award fees to successful plaintiffs. The Court in *Northcross* found that plaintiffs in school desegregation cases brought under the Emergency School Aid Act, like plaintiffs in Title II cases, act as "'private attorneys general.'" Therefore, as in *Piggie Park*, the Court ruled that they should ordinarily be awarded attorney's fees unless special circumstances would render such an award unjust.

The *Hall* and *Northcross* opinions reaffirm the liberal approach the Supreme Court has taken toward awarding attorney's fees to encourage socially desirable litigation. The decisions will no doubt reinforce the growing trend, discussed below, of the lower federal courts to award attorney's fees in an ever-widening range of public interest cases.

Park to award attorney's fees in an increasingly wider range of public interest cases. The narrowest extension of the *Piggie Park* rule was to cases brought under Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment.⁸⁴ Title VII contains a provision for the discretionary grant of attorney's fees identical to the provision involved in *Piggie Park*.⁸⁵ This similarity, combined with the fact that both Titles II and VII have as their underlying policy the elimination of racial discrimination, has led the courts to apply the holding of *Piggie Park* in Title VII cases. In *Clark v. American Marine Corp.*,⁸⁶ the district court recognized that Title VII, unlike Title II, allows litigants to recover damages.⁸⁷ But relying on *Piggie Park*, the court held that where Title VII plaintiffs had acted on behalf of a class and sought and obtained injunctive relief, they had been acting as "agents of the national policy" and were entitled to attorney's fees.⁸⁸ A similar holding was made by the Fourth Circuit in another Title VII case, *Lea v. Cone Mills Corp.*⁸⁹ That court found *Piggie Park* directly applicable even though the plaintiffs had sought damages for themselves, as well as injunctive relief for the class they represented.⁹⁰ Finally, in *Parham v. Southwestern Bell Telephone Co.*,⁹¹ the Eighth Circuit held that attorney's fees for services in both the district and appellate courts should be awarded to a Title VII plaintiff who had successfully established racial discrimination by the defendant, but had not received either the monetary or injunctive relief he sought.⁹² The court found that fees should be awarded because

[the] lawsuit acted as a catalyst which prompted the appellee to take action implementing its own fair employment policies and seeking compliance with the requirements of Title VII. In this sense, [the plaintiff] performed a valuable public service in bringing this action.⁹³

The lower federal courts have extended *Piggie Park* further

⁸⁴ 42 U.S.C. § 2000e (1970).

⁸⁵ 42 U.S.C. §§ 2000a-3(b), 2000e-5(k) (1970).

⁸⁶ 320 F. Supp. 709, 710-11 (E.D. La. 1970).

⁸⁷ Compare 42 U.S.C. § 2000a-3(a) (1970) with *id.* § 2000e-5(g) (1970). Other important differences have been suggested. See *Lea v. Cone Mills Corp.*, 438 F.2d 86, 90-91 (4th Cir. 1971) (dissenting opinion).

⁸⁸ 320 F. Supp. at 711. The court awarded fees of \$20,000. *Id.* at 712.

⁸⁹ 438 F.2d 86, 88 (4th Cir. 1971).

⁹⁰ The plaintiffs obtained injunctive relief, but were denied damages.

⁹¹ 433 F.2d 421 (8th Cir. 1970).

⁹² The court had denied injunctive relief on the ground that while the defendant had engaged in discriminatory practices at the time the suit was initiated, it had since abandoned such practices. *Id.* at 429.

⁹³ *Id.* at 429-30.

by narrowly construing the "special circumstances" exception to the award of attorney's fees.⁹⁴ For example, in *Miller v. Amusement Enterprises, Inc.*,⁹⁵ the Fifth Circuit awarded fees even though the defendants had not acted in bad faith or raised frivolous issues and several judges had agreed with their position.⁹⁶ The court ruled that attorney's fees must be awarded against them in order to effectuate the intent of Congress to encourage private litigants to enforce Title II.⁹⁷ In addition, the lower federal courts have refused to make the award of fees dependent on whether or not the plaintiffs are obligated to pay their attorneys,⁹⁸ or on the amount of that obligation.⁹⁹ Instead, the courts have made an independent assessment of what fees are "reasonable" in the circumstances.¹⁰⁰

The *Piggie Park* and *Mills* decisions have also led the lower federal courts to a broader application of the traditional exceptions to the general rule against awarding attorney's fees. In an increasing number of cases these exceptions have been applied when important public issues are involved and there is no statutory authority for the award of fees. In *Ojeda v. Hackney*,¹⁰¹ for example, the Fifth Circuit applied the common fund principle to award fees to an attorney who had successfully prosecuted a class action suit against a state's unlawful withholding of welfare benefits. The district court had held that under state law such fees could not be granted. The court of appeals, citing *Sprague v. Ticonic National Bank*,¹⁰² vacated the judgment and remanded the case on the ground that the district court possessed the equitable power to award attorney's fees regardless of state law.¹⁰³

⁹⁴ See text accompanying note 71 supra.

⁹⁵ 426 F.2d 534 (5th Cir. 1970).

⁹⁶ The district judge, two of the three judges on the original panel and five of the fourteen who heard the case en banc, agreed with the defendants. See 426 F.2d at 537 n.5, 538.

⁹⁷ Id. at 538. The court awarded reasonable attorney's fees for the original trial and appeal, for the trial and appeal on the issue of attorney's fees, and for the proceedings before the district court on remand.

⁹⁸ *Lea v. Cone Mills Corp.*, 438 F.2d 86 (4th Cir. 1971); *Clark v. American Marine Corp.*, 320 F. Supp. 709, 711-12 (E.D. La. 1970). In *Lea*, the plaintiffs were represented by a civil rights organization and did not owe their attorneys any fees. *Lea v. Cone Mills Corp.*, supra at 89. In *Clark*, one of the attorneys was on the staff of the NAACP Legal Defense and Educational Fund, Inc. *Clark v. American Marine Corp.*, supra at 711.

⁹⁹ *Clark v. American Marine Corp.*, 320 F. Supp. 709, 711 (S.D. La. 1970).

¹⁰⁰ Id. In *Lea*, the court of appeals remanded so that such a determination could be made. *Lea v. Cone Mills Corp.*, 438 F.2d 86, 88 (4th Cir. 1971).

¹⁰¹ 452 F.2d 947 (5th Cir. 1972).

¹⁰² 307 U.S. 161 (1939).

¹⁰³ The court of appeals stated that the district court could, in its discretion,

The Fifth Circuit has subsequently gone even further in its application of the common fund theory in public interest cases. *Callahan v. Wallace*¹⁰⁴ was a class action seeking to enjoin various Alabama officials from bringing traffic cases in the state's justice courts on the ground that the justices hearing these cases had a pecuniary interest in convicting each defendant. The plaintiffs also sought punitive and compensatory damages and a refund of all fines that had been collected after a certain date. The district court granted full injunctive relief, but declined to award damages, a refund or attorney's fees, and the plaintiffs appealed on the monetary issues.

The Fifth Circuit held that under the circumstances of the case, it was not improper to have denied damages and a refund. While the plaintiffs' attorneys had not been successful in obtaining any pecuniary award for the class they represented, they had nevertheless clearly established that certain earlier court decisions were applicable to every justice, sheriff and state trooper in Alabama. The court found that attorney's fees should be awarded even though the lawyers in the case "were not responsible for successful establishment of the underlying principle which, *in effect*, 'created the fund' of fines the refund of which plaintiffs sought."¹⁰⁵

Finally, in *Brewer v. School Board*,¹⁰⁶ the Fourth Circuit awarded counsel fees in a school desegregation case on the basis of a "quasi-application"¹⁰⁷ of the common fund doctrine. The general rule in such cases had been to make the grant of fees dependent on the good or bad faith of the school board,¹⁰⁸ and the district court had refused to award fees because it felt the board had made a good faith effort to desegregate. The court of appeals declined to disturb that conclusion, but went on to find that as a result of the appeal the plaintiffs had secured for the students of the school system the additional right of free transportation for all pupils assigned to schools beyond a reasonable walking distance from their homes. The court recognized that this right was not represented by a common fund and had not resulted in a monetary recovery against which attorney's fees could be charged.

either order the state to pay counsel fees from the funds that were to be disbursed to members of the class, or could order each member of the class to pay the attorney a pro rata share of his fee. 452 F.2d at 948.

¹⁰⁴ 466 F.2d 59 (5th Cir. 1972).

¹⁰⁵ *Id.* at 62 (emphasis added).

¹⁰⁶ 456 F.2d 943 (4th Cir.), cert. denied, 409 U.S. 892 (1972).

¹⁰⁷ *Id.* at 951.

¹⁰⁸ See the discussion of this rule in *id.* at 948-51.

But, the court concluded, as far as the students were concerned the result was the same as if a fund had been created. The pecuniary benefit to the students would under normal circumstances warrant the imposition against them of a charge for their proportionate share of the reasonable attorney's fees incurred in securing that benefit. That would not be practical in this case, however, and would defeat the basic purpose of the relief which was to provide transportation without cost to the pupils. In those circumstances the court concluded that it should make a "quasi-application" of the common fund doctrine and award reasonable attorney's fees against the school board.¹⁰⁹

There has also been a broader application of the improper conduct exception to the general rule on attorney's fees. Perhaps the furthest expansion of this exception occurred in *McEnteggart v. Cataldo*.¹¹⁰ In that case, the plaintiff, a nontenured professor, challenged the decision by the board of trustees of the college where he worked not to renew his contract. He alleged, among other things, that the board's failure to give him a statement of reasons for its action denied him procedural due process. The district court ordered the trustees to supply such a statement, and upon compliance by the board, dismissed the case.

On appeal, the First Circuit affirmed the dismissal. The court found, however, that one of its earlier decisions, rendered before the board of trustees informed the plaintiff of its decision not to rehire him, clearly required the board to supply a statement of the reasons for its action. The court held that under these circumstances attorney's fees should be assessed against the board, and said that:

[w]hile this may be unusual in that the defendants have prevailed on appeal, we think that it provides substantial justice since plaintiff was forced to go to court to obtain the statement of reasons to which he was constitutionally entitled.¹¹¹

While the *Piggie Park-Mills* doctrine has resulted in these

¹⁰⁹ One judge concurred in the award of attorney's fees but disagreed that the grant should be tied to the common fund principle. His opinion cited *Piggie Park* for the concept that such an award should be used by the courts to encourage private parties to sue for injunctive relief when the suit would advance the public interest. In his view, the court did not require a statute to make the award. Since the Supreme Court had abandoned the notion of "all deliberate speed" in favor of immediate school desegregation, there was a presumption against the school board in cases of delay. To encourage private parties to assist the Attorney General in enforcement of this policy, courts should award attorney's fees in all school desegregation cases, unless special circumstances made the award unjust. *Id.* at 953-54.

¹¹⁰ 451 F.2d 1109 (1st Cir. 1971).

¹¹¹ *Id.* at 1112.

new applications of the traditional exceptions, its greatest significance lies in the fact that it has provided judges with a new basis for awarding attorney's fees in cases that may not fit within any of the traditional categories in which fees are allowed and where there is no statute authorizing such an award. Both the First and Fifth Circuits¹¹² have given broad application to the *Piggie Park-Mills* doctrine in cases involving racial discrimination. In *Knight v. Auciello*,¹¹³ the district court had declined to award attorney's fees in a case where the defendant refused to rent an apartment to the plaintiff because of his race. Although the statute under which the plaintiffs sued, 42 U.S.C. § 1982, was silent on the question of attorney's fees, the First Circuit, citing *Piggie Park*, held that an award should have been made because

[t]he violation of an important public policy may involve little by way of actual damages, so far as a single individual is concerned, or little in comparison with the cost of vindication, as the case at bar illustrates. If a defendant may feel that the cost of litigation, and, particularly, that the financial circumstances of an injured party may mean that the chances of suit being brought, or continued in the face of opposition, will be small, there will be little brake upon deliberate wrongdoing. In such instances public policy may suggest an award of costs that will remove the burden from the shoulders of the plaintiff seeking to vindicate the public right. We regard this as such a case.¹¹⁴

The Fifth Circuit in *Lee v. Southern Home Sites Corp.*¹¹⁵ awarded fees to successful black plaintiffs who charged that the defendants had violated 42 U.S.C. § 1982 by refusing to sell them lots on the same terms they sold lots to white persons. Although the defendants were guilty of "unreasonable, obdurate obstinacy," the court based its holding on "a broader ground." It found that while section 1982 does not mention fees, the Supreme Court's decision in *Mills* "demonstrates that it is proper for federal courts to award attorney's fees when this remedy effectuates congressional policy."¹¹⁶ And in determining that fees should be available under section 1982, the court stated:

¹¹² The Second Circuit, while denying attorney's fees on the facts of the particular case, has nonetheless recognized that the *Mills* decision might support such an award even in the absence of specific congressional authorization. See *Greene County Planning Bd. v. FPC*, 455 F.2d 412, 426-27 (2d Cir.), cert. denied, 409 U. S. 849 (1972).

¹¹³ 453 F.2d 852 (1st Cir. 1972).

¹¹⁴ *Id.* at 853.

¹¹⁵ 444 F.2d 143 (5th Cir. 1971).

¹¹⁶ *Id.* at 144. The Fifth Circuit found that the *Mills* decision "is better understood as resting heavily on its acknowledgment of 'overriding considerations,' that private suits are necessary to effectuate congressional policy and that awards

We think the factors relied on in *Piggie Park* in interpreting the provision for awarding attorney's fees apply also to suits under § 1982. . . . The statute, under present judicial development, depends entirely on private enforcement. Although damages may be available . . . in many cases there may be no damages or damages difficult to prove. To ensure that individual litigants are willing to act as "private attorneys general" to effectuate the public purposes of the statute, attorney's fees should be . . . available. . . .¹¹⁷

Building on its *Lee* decision, the Fifth Circuit later held in *Cooper v. Allen*¹¹⁸ that as far as the award of attorney's fees is concerned there should be no distinction between suits brought under 42 U.S.C. § 1982 (such as *Lee*) and those brought pursuant to 42 U.S.C. § 1981 (*Cooper*).¹¹⁹ The court therefore remanded the case to the district judge ordering him either to articulate specific and justifiable reasons for his denial of attorney's fees, or to make a reasonable award to the plaintiffs.

The latest development in the circuit and district courts has been the utilization of the *Piggie Park-Mills* doctrine to award attorney's fees, in the absence of an authorizing statute, in cases that do not involve racial discrimination.¹²⁰ In *Sims v. Amos*,¹²¹ a reapportionment case brought pursuant to 42 U.S.C. § 1983, the court though finding bad faith on the part of the defendants

of attorney's fees are necessary to encourage private litigants to initiate such suits." Id. at 145.

¹¹⁷ Id. at 147-48.

¹¹⁸ 467 F.2d 836 (5th Cir. 1972).

¹¹⁹ Other courts have built on *Cooper* and held that with regard to attorney's fees there should also be no distinction between suits brought under 42 U.S.C. §§ 1981 and 1982, and those brought pursuant to 42 U.S.C. § 1983. See *NAACP v. Allen*, 340 F. Supp. 703 (M.D. Ala. 1972); *Jinks v. Mays*, 332 F. Supp. 254 (N.D. Ga. 1971). For a discussion of *Jinks v. Mays*, see text accompanying notes 124-27 *infra*.

¹²⁰ In addition to the cases discussed *infra*, some other reported decisions that have awarded attorney's fees under such circumstances are: *Ross v. Goshi*, 351 F. Supp. 949 (D. Haw. 1972) (illegality of law prohibiting outdoor political campaign signs); *Newman v. Alabama*, 349 F. Supp. 278 (M.D. Ala. 1972) (inadequate medical treatment of prisoners); *Wyatt v. Stickney*, 344 F. Supp. 387 (M.D. Ala. 1972) (improper treatment of mentally ill patients); *Shull v. Columbus Mun. Separate School Dist.*, 338 F. Supp. 1376 (N.D. Miss. 1972) (improper exclusion from school of unwed mothers); *Local 4076, United Steelworkers v. United Steelworkers*, 338 F. Supp. 1154 (W.D. Pa. 1972) (breach by union of duty of fair representation); *Bates v. Hinds*, 334 F. Supp. 528 (N.D. Tex. 1971) (improper dismissal of teacher); *Hammond v. Housing Auth.*, 328 F. Supp. 586 (D. Ore. 1971) (discrimination against welfare recipients). Many courts are awarding attorney's fees without even discussing the issue. See, e.g., *Bates v. Hinds*, *supra*; *Hammond v. Housing Auth.*, *supra*. For a compilation of reported and unreported public interest cases in federal courts where attorney's fees have been awarded, see *Derfner, Attorney's Fees in Pro Bono Publico Cases* (1972) (published by Lawyer's Committee for Civil Rights, 733 15th Street, N.W., Washington, D.C.).

¹²¹ 340 F. Supp. 691 (M.D. Ala.), *aff'd mem.*, 409 U.S. 942 (1972).

specifically based its award of attorney's fees on a broader ground. The court looked to the issues involved in the litigation and found that "[n]o other right is more basic to the integrity of our democratic society than is the right plaintiffs assert here to free and equal suffrage."¹²² The court further found that the plaintiffs' efforts had benefited a broad class of persons. Therefore, concluded the court, the plaintiffs had acted as private attorneys general, and in order to eliminate the financial impediments to such litigation the plaintiffs should be awarded attorney's fees regardless of the defendants' good or bad faith. "Indeed, under such circumstances, the award loses much of its discretionary character and becomes a part of the effective remedy a court should fashion to encourage public-minded suits."¹²³

Another district court has also concluded that in the absence of special circumstances attorney's fees must be awarded to successful plaintiffs in actions brought pursuant to 42 U.S.C. § 1983. *Jinks v. Mays*¹²⁴ was a class action that held unconstitutional the denial of maternity leave to nontenured teachers when such a right was granted to persons with tenure. The district court, without any explanation, declined to act on the plaintiff's request for attorney's fees. On appeal, the Fifth Circuit remanded the case to the district court for findings of fact and a determination of the attorney's fees issue.¹²⁵ The district court on remand¹²⁶ noted that the Fifth Circuit in *Lee v. Southern Home Sites Corp.* and *Cooper v. Allen* had applied *Piggie Park* to actions brought pursuant to 42 U.S.C. §§ 1981 and 1982, and ruled that attorney's fees should be awarded in such cases unless special circumstances would render such an award unjust. The court found that the same rule should be applicable in actions brought pursuant to 42 U.S.C. § 1983 since such cases were difficult to distinguish from section 1981 and section 1982 actions.¹²⁷

The Court of Appeals for the District of Columbia has also relied on the *Piggie Park-Mills* doctrine in a case not involving racial discrimination. *Yablonski v. United Mine Workers*¹²⁸ was an action brought under the Labor-Management Reporting and Disclosure Act (LMRDA).¹²⁹ The district court, relying on

¹²² Id. at 694.

¹²³ Id.

¹²⁴ 332 F. Supp. 254 (N.D. Ga. 1971).

¹²⁵ 464 F.2d 1228 (5th Cir. 1972).

¹²⁶ 350 F. Supp. 1037 (N.D. Ga. 1972).

¹²⁷ See also *NAACP v. Allen*, 340 F. Supp. 703 (M.D. Ala. 1972).

¹²⁸ 466 F.2d 424 (D.C. Cir. 1972), cert. denied, 41 U.S.L.W. 3622 (U.S. May 29, 1973) (No. 72-679).

¹²⁹ 29 U.S.C. §§ 401 et seq. (1970).

Fleischmann Distilling Corp. v. Maier Brewing Co.,¹³⁰ had refused to award attorney's fees on the theory that where Congress has provided a scheme of rights and remedies and has not expressly provided for attorney's fees, the court should not exercise its inherent powers to award fees. The court of appeals rejected that analysis and reversed the denial of the plaintiff's motion for attorney's fees. The circuit court held that judicial inquiry does not end merely because Congress has not expressly provided for the award of fees. The court must go beyond the words of the statute and ask (1) whether Congress manifested an intent to preclude the allowance of fees, and if not (2) whether awarding fees would be appropriate.

Applying that analysis to *Yablonski*, the court of appeals first concluded that despite the fact that Congress had provided for attorney's fees in two sections of the LMRDA, there was no definitive evidence that Congress intended to preclude the award of fees in cases brought under other sections of that act. Turning then to the appropriateness of awarding fees, the court looked at the issues involved in the lawsuit and the impact of the decision on persons other than the plaintiffs. The court found that the litigation had provided significant benefits to the union and its members and that it was therefore appropriate to award attorney's fees to the plaintiff.¹³¹

Yet another decision that applied the *Piggie Park-Mills* doctrine to a case not involving racial discrimination is *La Raza Unida v. Volpe*.¹³² That case is perhaps the most significant because of the reasoned analysis provided by the court in reaching its decision. The lawsuit was initiated to enjoin the construction of a highway. After succeeding in that action,¹³³ the plaintiffs moved for attorney's fees against the California Highway Department, California Department of Public Works, and the Chief Highway Engineer of the State of California. Because the stat-

¹³⁰ 386 U.S. 714 (1967). See text accompanying notes 72-75 supra.

¹³¹ The court held that the award of attorney's fees was proper even though three of the suits had never gone beyond the issuance of a preliminary injunction and the fourth failed to go even that far. The stage the suit reached was relevant only to the issue of how much should be awarded, but not to the question of whether to make any award at all. "As all lawyers know, a lawsuit does not always have to go to final adjudication on the merits in order to be effective." 466 F.2d at 431.

As previously noted, the Supreme Court, in *Hall v. Cole*, recently approved the award of attorney's fees under the LMRDA on a "common benefit" rationale. See note 83 supra.

¹³² 57 F.R.D. 94 (N.D. Cal. 1972), appeal docketed, No. 73-1145, 9th Cir., Jan 11, 1973.

¹³³ 337 F. Supp. 221 (N.D. Cal. 1971), cert. denied, 409 U.S. 890 (1972).

utes which were the basis for relief in the case did not provide for the award of fees, the court looked to see if the case fell into one of the judge-created exceptions allowing fees. The court decided that neither the improper conduct nor common fund exception was applicable. It then turned to what it termed “the ‘private attorney general’ situation” and concluded that *Mills* did not give the federal courts license to award attorney’s fees in all cases. Rather, the court must exercise its sound discretion and base its decision on such factors as the strength of the congressional policy, the number of persons benefited by the plaintiffs’ efforts, and the necessity and financial burden of private enforcement.¹³⁴ Reviewing other cases that had awarded fees in the private attorney general situation, the court found that

[t]he rule briefly stated is that whenever there is nothing in a statutory scheme which might be interpreted as precluding it, a “private attorney-general” should be awarded attorney’s fees when he has effectuated a strong Congressional policy which has benefited a large class of people, and where further the necessity and financial burden of private enforcement are such as to make the award essential.¹³⁵

Applying its analysis to the case before it, the court found that the issues involved were of great importance and priority, and that as a result of the plaintiffs’ efforts a substantial number of persons had benefited. The court further found that because of the limited resources and potentially conflicting interests within and among governmental entities, the public policies involved in the lawsuit (environmental protection and housing relocation) often depend on private vigilance and enforcement. The court then stated:

Responsible representatives of the public should be encouraged to sue, particularly where governmental entities are involved as defendants. As the amicus brief points out, only private citizens can be expected to “guard the guardians.”

However, these exhortations towards citizen participation can sound somewhat hollow against the background of the economic realities of vigorous litigation. In many “public interest” cases only injunctive relief is sought, and the average attorney or litigant must hesitate, if not shudder, at the thought of “taking on” an entity such as the California Department of Highways, with no prospect of financial compensation for the efforts and expenses rendered. The expense of litigation in such a case poses a formidable, if not insurmountable, obstacle.¹³⁶

¹³⁴ 57 F.R.D. at 99.

¹³⁵ *Id.* at 98.

¹³⁶ *Id.* at 100-01.

Finally, the court held that because of the presence of the three factors it had discussed—(1) the effectuation of strong public policies, (2) the benefits conferred on numerous persons by the litigation, and (3) the necessity and financial burden of private enforcement—the court should exercise its equitable powers and award attorney’s fees. And in doing so the court stated:

We cannot emphasize enough that in granting this motion, the purpose is not to saddle the losing party with the financial burden in order to punish him, rather we shift the financial burden in order to effectuate a strong Congressional policy.¹³⁷

In sum, the Supreme Court, in the *Piggie Park* and *Mills* decisions, has shown increasing receptivity to the principle that attorney’s fees should be awarded to successful private plaintiffs who help to effectuate important public policies by securing through litigation benefits that inure to the class or group they represent. This new approach of the Supreme Court has been followed by the lower federal courts, which, in a series of cases beginning soon after *Piggie Park*, have liberally interpreted statutory provisions authorizing the award of attorney’s fees, have applied more broadly the exceptions to the general rule against granting fees, and have awarded fees in contexts where the traditional exceptions are not applicable.

V

CONCLUSION

Nearly a decade ago, the Supreme Court noted that “under the conditions of modern government, litigation may well be the sole practicable avenue open . . . to petition for redress of grievances.”¹³⁸ Unfortunately, however, even that avenue is often closed today. Many important issues, affecting large numbers of people, cannot be litigated simply because the prospective plaintiffs are unable to afford an attorney. While the Legal Services

¹³⁷ *Id.* at 102. It is important to note certain other aspects of the case, as well. First, the court awarded attorney’s fees even though the attorneys required no fees of their clients and received tax-exempt foundation money. Those facts in the court’s view were not germane to the plaintiff’s status as a private attorney general because “[w]e cannot presume Congress intended to rely on tax-exempt foundations to fund costs of litigation in order to effectuate its policies, nor that such funding will continue in the future.” *Id.* at 98 n.6.

Second, the court rejected the notion that it could not award fees where the real party in interest was the State of California and held that sovereign immunity was no bar to awarding fees against the State’s chief engineer. *Id.* at 101-02 n.11. And finally, the court reimbursed the plaintiffs for their expert witness fees. *Id.* at 102.

¹³⁸ *NAACP v. Button*, 371 U.S. 415, 430 (1963).

Program, private organizations and the newly established public interest law firms have ameliorated this situation to some extent, the ultimate solution lies in the wider involvement of the private bar in litigating important public interest issues.

That development, however, will occur only when such litigation becomes fee-generating. This might, of course, be accomplished by statute; but the courts need not, and should not, await legislative action. As we have already seen, the judiciary has the inherent equitable power to award fees and has traditionally done so in a broad range of cases. Moreover, the judiciary has not hesitated to act in protection of its jurisdiction. In the criminal field, the Supreme Court has struck down requirements that denied judicial review to indigent defendants,¹³⁹ and more recently the Court has invalidated provisions that denied access to the judiciary to poor persons who wished to obtain divorces.¹⁴⁰

The courts have further protected their jurisdiction in recent years by expanding the concept of "standing,"¹⁴¹ thereby permitting greater access to the judicial system for persons wishing to act as "vigilant private attorneys general."¹⁴² But the individual who has "standing" to sue can utilize the courts only if he is able to secure legal representation. It is meaningless, for example, to grant standing to conservationists who wish to challenge the actions of the federal government.¹⁴³ if their legal expenses will

¹³⁹ In *Griffin v. Illinois*, 351 U.S. 12 (1956), the Court held that indigent criminal defendants could not be denied a full direct appellate review because they were unable to afford a stenographic transcript of the trial proceedings. Three years later this holding was expanded in *Burns v. Ohio*, 360 U.S. 252 (1959), when the Court ruled that an indigent defendant who already had his conviction reviewed by an intermediate state court could not be denied a further review by the state supreme court merely because he was unable to pay the filing fee. And in 1961, the Supreme Court held that an indigent prisoner could not be required to pay a filing fee in order to apply for a writ of habeas corpus. *Smith v. Bennett*, 365 U.S. 708 (1961).

¹⁴⁰ *Boddie v. Connecticut*, 401 U.S. 371 (1971).

¹⁴¹ See, e.g., *Barlow v. Collins*, 397 U.S. 159 (1970) (tenant farmers challenging regulation of Secretary of Agriculture); *Flast v. Cohen*, 392 U.S. 83 (1968) (federal taxpayers challenging expenditure of federal funds); *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966) (representatives of listening public challenging license renewal for radio station); *Bebchick v. Public Util. Comm'n*, 318 F.2d 187 (D.C. Cir.), cert. denied, 373 U.S. 913 (1963) (transit riders challenging fare increase); *Powelton Civic Home Owners Ass'n v. HUD*, 284 F. Supp. 809 (E.D. Pa. 1968) (residents of affected area challenging urban renewal program). But see *Sierra Club v. Morton*, 405 U.S. 727 (1972).

¹⁴² *Flast v. Cohen*, 392 U.S. 83, 109 (1968) (Douglas, J., concurring).

¹⁴³ See, e.g., *Citizens Comm. for the Hudson Valley v. Volpe*, 425 F.2d 97 (2d Cir.), cert. denied, 400 U.S. 949 (1970) (challenge to issuance of permit for dredging, filling river); *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966) (challenge to construction of

be so great that litigation is economically impossible.¹⁴⁴ Yet, if it is appropriate for the courts to protect their jurisdiction by expanding the doctrine of standing, it is equally appropriate for them to protect their jurisdiction by expanding the award of attorney's fees.

There need be no fear that this development will result in a flood of frivolous litigation. This spectre, of course, has been raised whenever the courts have considered expanding the doctrine of standing, but as Chief Justice Burger has noted, fears of inundation "are rarely borne out."¹⁴⁵ His observation is equally true with regard to the award of attorney's fees in public interest cases. As already noted, most public interest litigation is complex and time consuming, and since the plaintiffs are generally without great financial resources and damages are not sought, the attorney's only source of remuneration will be an award of fees by the court *if he is successful*. Thus, few attorneys will be interested in handling any case that appears to be frivolous or to stand little chance of success.¹⁴⁶

The trend toward awarding attorney's fees to individuals who have acted as private attorneys general should therefore be continued and expanded. This can be accomplished in many cases, as it was in *Piggie Park*, simply by a liberal judicial construction of statutes that authorize the judge to grant fees in his discretion. Where no such statute is involved, the award often can be based on traditional equitable principles. For example, the same reasoning that has justified the award of attorney's fees in traditional "common fund" cases is applicable to taxpayer's suits that result in a monetary recovery for the public. It is unfair for the plaintiff

hydroelectric project); *Road Review League v. Boyd*, 270 F. Supp. 650 (S.D.N.Y. 1967) (challenge to highway route).

¹⁴⁴ See Sive, *supra* note 13, at 618-19.

¹⁴⁵ *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1006 (D.C. Cir. 1966).

¹⁴⁶ Moreover, judges possess very significant discretionary powers which can be employed to keep frivolous suits out of court. For example, a suit can be dismissed for lack of standing if the plaintiffs are not "representative" and "responsible" individuals or groups. See, e.g., *Citizens Comm. for the Hudson Valley v. Volpe*, 425 F.2d 97, 105 (2d Cir.), cert. denied, 400 U.S. 949 (1970); *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1005 (D.C. Cir. 1966). And one of the prerequisites for a class action under Rule 23 of the Federal Rules of Civil Procedure is that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a) (4). This has been interpreted by the courts to require "that the party's attorney be qualified, experienced and generally able to conduct the proposed litigation." *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 562 (2d Cir. 1968). Since many or most public interest lawsuits will involve standing and class action issues, the courts will have ample powers to eliminate any that are frivolous.

who successfully brings such a suit to bear all the costs of litigation, while his fellow citizens, who benefit equally, incur no expense at all. In the absence of a statute providing for attorney's fees, the courts should exercise their equitable powers and award counsel fees to the successful plaintiff from the fund he has rescued or created.¹⁴⁷

In like manner, the reasons that lie behind the award of attorney's fees in shareholder derivative suits where there is no monetary recovery apply with equal force in much public interest litigation.¹⁴⁸ This is true, for instance, in most suits brought against public officials. Just as the minority shareholder cannot, simply by exercising his right to vote, eliminate improper actions by the corporation's directors or officers, so too the citizen must often resort to litigation to prevent or correct abuses by his elected officials. In both cases, the benefits of the lawsuit flow not just to the plaintiff bringing the action, but to the entire class he represents, *i.e.*, the shareholders or the general public, and therefore it is only equitable that the plaintiff's legal expenses be borne by that class.^{148a} In the derivative suit this is not accomplished directly by taxing each individual shareholder, but instead is achieved indirectly by ordering the corporation to pay the plaintiff's attorney's fees. Similarly, in public interest suits where the government is the defendant, the entire public can be made to share the successful plaintiff's costs by ordering the government to pay his attorney's fees.

Often the award of attorney's fees in public interest cases can also be based on the traditional doctrine of punishing the defendant who has engaged in fraudulent, groundless, oppressive or vexatious conduct, or has acted in a manner he clearly knew was illegal. For example, in a welfare case in which the court finds that

¹⁴⁷ This approach was followed by the District of Columbia Circuit in *Bebchick v. Public Util. Comm'n*, 318 F.2d 187 (D.C. Cir.), cert. denied, 373 U.S. 913 (1963), and *Washington Gas Light Co. v. Baker*, 195 F.2d 29 (D.C. Cir. 1951), and was recently adopted by the Fifth Circuit in *Ojeda v. Hackney*, discussed in text accompanying notes 101-03 *supra*, and by the Fourth Circuit in *Brewer v. School Bd.*, discussed in text accompanying notes 106-09 *supra*.

¹⁴⁸ In a recent case brought against the Philadelphia-Baltimore-Washington Stock Exchange for alleged violations of the 1934 Securities Exchange Act, the successful plaintiff requested attorney's fees. Citing *Mills*, the court held that the absence of express statutory authority and the fact that the action did not produce a monetary fund did not preclude the award of fees. The court found that the lawsuit had conferred a benefit upon the exchange and its members, and that therefore the plaintiff was entitled to reasonable attorney's fees. *Bright v. Philadelphia-Baltimore-Washington Stock Exch.*, 327 F. Supp. 495, 506 (E.D. Pa. 1971).

^{148a} This is the "common benefit" rationale enunciated by the Supreme Court in *Hall v. Cole*, discussed in note 83 *supra*.

state or county officials have acted in blatant disregard of prior court decisions or of federal regulations, attorney's fees should be awarded to the successful plaintiff on the ground that these costs have been incurred only because of the defendant's misconduct.¹⁴⁹

But even when there is no statute authorizing the award of attorney's fees and traditional equitable doctrines allowing such an award are not applicable, the *Piggie Park-Mills* doctrine dictates that unless there is a specific statutory prohibition, the courts should nevertheless award attorney's fees *as a matter of course* to the successful plaintiff who has acted as a private attorney general to vindicate the public interest.¹⁵⁰ As this becomes the common practice, the award of fees in such cases will serve both as an incentive to members of the private bar to engage in litigation involving important public issues and as a deterrent to future wrongdoing.¹⁵¹

It should be stressed, however, that neither of these benefits will be realized unless the courts award attorney's fees in an amount that adequately compensates the plaintiff's counsel for his time and effort.¹⁵² Mere token awards should not be made,

¹⁴⁹ Cf. *Callahan v. Wallace*, 466 F.2d 59, 62 (5th Cir. 1972). As previously noted, attorney's fees have been awarded in a large number of school desegregation cases where the defendants failed to make good faith efforts to achieve racial intergration. See notes 64-65 *supra*.

¹⁵⁰ It should be noted that attorney's fees have been awarded even though the plaintiff was represented by an attorney who required no fee. See *La Raza Unida v. Volpe*, 57 F.R.D. 94, 98 n.6 (N.D. Cal. 1972), appeal docketed, No. 73-1145, 9th Cir., Jan. 11, 1973; *Lee v. Southern Home Sites Corp.*, 444 F.2d 143, 147 n.3 (5th Cir. 1971).

¹⁵¹ Attorney's fees should not be awarded as a matter of course to successful defendants in public interest lawsuits. No public policy would be promoted by such awards since the defendants have not acted as private attorneys general and need no incentive to act as defendants. In fact, routinely awarding attorney's fees to defendants would have the undesirable result of discouraging individuals from acting as private attorneys general. Nor is reimbursing defendants as a matter of course necessary to discourage the bringing of frivolous public interest litigation. As already noted, economic considerations make it unlikely that frivolous suits will be brought, see text accompanying note 146 *supra*, and the court always has the equitable power to award fees to the defendants if a suit is in fact frivolous. Perhaps it is for the above reasons that the 1968 Civil Rights Act provides that attorney's fees can only be awarded to prevailing plaintiffs. 42 U.S.C. § 3612(c) (1970).

There appear to be no cases where a successful defendant in a public interest suit has been awarded fees against a private plaintiff. Fees were awarded, however, against the federal government in *United States v. Gray*, 319 F. Supp. 871 (D.R.I. 1970). The government conceded liability and, as the court noted, assessing fees against it would not discourage future private litigation. *Id.* at 872.

¹⁵² In *Knoff v. City & County of San Francisco*, 1 Cal. App. 3d 184, 203 & n.14, 81 Cal. Rptr. 683, 695 & n.14 (1969), a taxpayer's suit to compel the collection of previously uncollected tax assessments, the court, acting under a statute

but rather the same considerations that the courts have traditionally taken into account when awarding fees as part of their inherent equitable powers, or pursuant to hundreds of federal¹⁵³ and state¹⁵⁴ statutes, should be utilized for arriving at just awards in public interest cases. It should be error for the trial judge to consider only the amount of the recovery.¹⁵⁵ The other factors that should be taken into account are:¹⁵⁶ the nature of the litigation; the novelty and difficulty of the questions involved; the skill required in the case; the skill and resourcefulness of the opposing counsel; the amount of time the attorney spent on the case; the attorney's age, skill and learning; his experience in the particular subject matter area; his standing in the legal community; the loss of employment for the attorney while working on the case; and the customary charges of the Bar for similar services.¹⁵⁷

calling for "reasonable compensation for attorney's fees," at first fixed its award at 20% of the first one million dollars of revenues recovered, 10% of the second million, and five percent of the third million. Upon reconsideration, the court awarded the attorney 15% of sums recovered, which at the time of the decision amounted to almost ten million dollars. Order and Judgment, Nov. 18, 1970. For a discussion of the awards made in shareholder class action suits, see Hornstein, *Legal Therapeutics: The "Salvage" Factor In Counsel Fee Awards*, 69 Harv. L. Rev. 658, 667-69 (1956).

¹⁵³ See, e.g., Packers and Stockyards Act of 1921 § 309(f), 7 U.S.C. § 210(f) (1970); Perishable Agricultural Commodities Act of 1930 § 7(b), 7 U.S.C. § 499g(b) (1970); Clayton Act § 4, 15 U.S.C. § 15 (1970); Trust Indenture Act of 1939 § 323(a), 15 U.S.C. § 77www(a) (1970); Securities Exchange Act of 1934 §§ 9(e), 18(a), 15 U.S.C. §§ 78i(e), 78r(a) (1970); Copyright Act § 1, 17 U.S.C. § 116 (1970); Fair Labor Standards Act of 1938 § 16(b), 29 U.S.C. § 216(b) (1970); Patent Act § 285, 35 U.S.C. § 285 (1970); Veterans' Benefits Act § 1822(b), 38 U.S.C. § 1822(b) (1970); Civil Rights Act of 1964 § 204(b), 42 U.S.C. § 2000a-3(b) (1970); Civil Rights Act of 1968 § 812(c), 42 U.S.C. § 3612(c) (1970); Railway Labor Act § 3(p), 45 U.S.C. § 153(p) (1970); Merchant Marine Act of 1936 § 810, 46 U.S.C. § 1227 (1970); Communications Act of 1934 § 206, 47 U.S.C. § 206 (1970); Interstate Commerce Act §§ 8, 16, 308(b), 49 U.S.C. §§ 8, 16(2), 908(b) (1970).

¹⁵⁴ For a listing of some of the fee shifting provisions found in the statutes of California, Minnesota, Texas and Washington, see Stoebuck, *supra* note 12, at 209-11.

¹⁵⁵ Cf. *Brotherhood of R.R. Signalmen v. Southern Ry.*, 380 F.2d 59, 68-69 (4th Cir.), cert. denied, 389 U.S. 958 (1967). It is perfectly proper for the attorney's fee to exceed the recovery gained for the client. See, e.g., *Hill v. Franklin County Bd. of Educ.*, 390 F.2d 583 (6th Cir. 1968) (award of \$1000 not excessive where recovery for client was \$286.80).

¹⁵⁶ Over the years, many courts have set out what they considered to be the relevant factors for determining a reasonable attorney's fee. See, e.g., *Brotherhood of R.R. Signalmen v. Southern Ry.*, 380 F.2d 59, 69 (4th Cir.), cert. denied, 389 U.S. 958 (1967); *Berkshire Mut. Ins. Co. v. Moffett*, 378 F.2d 1007, 1013 (5th Cir. 1967); *La Mesa-Spring Valley School Dist. v. Otsuka*, 57 Cal. 2d 309, 316, 369 P.2d 7, 11, 19 Cal. Rptr. 479, 483 (1962). The Canons of Professional Ethics of the American Bar Association No. 12 and 6 J. Moore, *Federal Practice* ¶ 54.77[2], at 1716 (1972) also list relevant factors for determining attorney's fees.

¹⁵⁷ Judges usually believe that "[a] trial court has first-hand knowledge of

Appellate courts must stand ready to modify awards that are "wholly inadequate."¹⁵⁸ Only by fairly compensating the successful plaintiff's attorney for his time and effort will the private bar become more involved in public interest litigation, and will society's interests best be served.

the proceedings before it and is thus clearly qualified to 'place a value on [the attorney's] services without opinion evidence of an expert witness on the subject.'" *Montalvo v. Tower Life Bldg.*, 426 F.2d 1135, 1150 (5th Cir. 1970) (citation omitted). Usually, therefore, the trial court will have the attorney submit only documentary evidence of the time he spent on the case and the expenses incurred. Sometimes, however, the court may also require the attorney to present affidavits from members of his home bar giving their estimate of the fair value of the legal services rendered. See, e.g., *Electronics Capital Corp. v. Sheperd*, 439 F.2d 692 (5th Cir. 1971) (per curiam).

¹⁵⁸ Cf. *Monaghan v. Hill*, 140 F.2d 31, 34 (9th Cir. 1944) (district court ordered to raise its award of \$12,500 to at least \$50,000).

NOTES

AWARDING ATTORNEYS' FEES TO THE "PRIVATE ATTORNEY GENERAL": JUDICIAL GREEN LIGHT TO PRIVATE LITIGATION IN THE PUBLIC INTEREST

A new exception to the traditional refusal of the American legal system to award attorneys' fees to victorious litigants is currently emerging in the federal courts. Predicated upon the desire to encourage litigation aimed at vindicating strong national policies, a number of federal courts will now award counsel fees to those plaintiffs who have pursued certain types of public interest actions to a successful conclusion.¹

The implications of this new exception would seem to be of considerable significance. Traditionally, enforcement of those federal laws designed to protect broad public interests has depended almost exclusively upon the efforts of the United States Attorney General's office and various administrative agencies. Although considerable efforts have been channeled through these public instrumentalities, the inherent limitations of restricted funding, heavily centralized bureaucratic organization and, in many instances, direct conflicts of interest, have substantially impaired their overall effectiveness.² By eliminating the main obstacle to private litigation in the public interest—the prohibitive expense of hiring legal counsel³—these federal courts have made it possible for public-minded individuals to supplement the efforts of public enforcement agencies, and to do so free of the constraints of those politically dependent bodies.

1. *See, e.g.*, *Knight v. Auciello*, 453 F.2d 852 (1st Cir. 1972); *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971); *Ross v. Goshi*, 351 F. Supp. 949 (D. Haw. 1972); *La Raza Unida v. Volpe*, Civ. No. C-71-1166 RFP (N.D. Cal. Oct. 19, 1972); *Wyatt v. Strickney*, 344 F. Supp. 387 (M.D. Ala. 1972); *NAACP v. Allen*, 340 F. Supp. 703 (M.D. Ala. 1972).

2. *See La Raza Unida v. Volpe*, Civ. No. C-71-1166 RFP at 9 (N.D. Cal. Oct. 19, 1972).

3. In addition to the monetary obstacle, two major legal hurdles may also effectively bar pro bono litigation by private individuals, namely, the question of "standing," *see, e.g.*, *Sierra Club v. Morton*, 405 U.S. 727 (1972), and the question of whether the statute in question allows for a private, as opposed to public, right of action based upon its violation. *Compare, e.g.*, *Holloway v. Bristol-Myers Corp.*, 327 F. Supp. 17 (D.D.C. 1971), with *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964).

The social value of encouraging pro bono litigation in this manner is manifest: substantially increasing the enforcement potential of our country's civil laws will naturally lead to an accelerated realization of the policies behind these laws, and, in the broader context, a far greater ability to respond to the perceived needs and desires of society. This note will examine the legal conceptualization and practical application of the still embryonic "private attorney general" fee shifting doctrine. Specifically it will chronicle the judicial generation of the new rule, examine the latest group of cases which have relied upon it to shift the plaintiff's attorney expenses to the losing defendant, suggest additional conceptual and substantive refinements which might facilitate effectuation of the rule's underlying policy, and analyze the reasoning of the only federal decision to date which has expressly eschewed its application.

Emergence of the New Fee Shifting Rationale

The Historical Backdrop of Fee Shifting in the Federal Courts

Traditionally it has been the rule in the United States that attorneys' fees are not assessable against the losing litigant either in the form of court costs or as part of the prevailing party's damages award.⁴ Rather, each party generally has been left to bear for himself the expenses of retaining legal counsel. As with most generalizations in the law, however, the rule against fee shifting has been riddled with various exceptions. These may be divided into two general categories: those exceptions promulgated by statute and those created by the courts pursuant to their general equity powers.

Statutory exceptions are patterned according to two basic prototypes. The first type of statute requires automatic transference of fees and typically provides that "[i]f the petitioner shall finally prevail [in an action brought pursuant to the statute] he shall be allowed a reason-

4. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967). In *Fleischmann* Chief Justice Warren pointed out that "[i]n support of the American rule, it has been argued that since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel. . . . Also, the time, expense, and difficulties of proof inherent in litigating the question of what constitutes reasonable attorney's fees would pose substantial burdens for judicial administration." *Id.* at 718. Many commentators, on the other hand, have argued in favor of the English practice of awarding attorneys' fees to the prevailing litigant in almost all civil suits. See Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792 (1966); Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?*, 49 IOWA L. REV. 75 (1963); Stoebeck, *Counsel Fees Included in Costs: A Logical Development*, 38 COLO. L. REV. 202 (1966); Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 VAND. L. REV. 1216 (1967).

able attorney's fee, to be taxed and collected as part of the costs of the suit."⁵ In contrast to these mandatory provisions, several federal statutes confer discretionary power upon the courts to shift counsel fees to the prevailing litigant. Statutes of this later variety may in some cases restrict the court's discretion by detailing various guidelines on which the court must make its determination.⁶

The second major source of exceptions to the basic no-fee-shifting rule has been the general equity powers of the federal judiciary. In commenting upon this inherent authority, Justice Frankfurter noted:

Allowance of [attorneys'] costs in appropriate situations is part of the historic equity jurisdiction of the federal courts. The suits "in equity" of which these courts were given "cognizance" ever since the First Judiciary Act, constituted that body of remedies, procedures and practices which theretofore had been evolved in the English Court of Chancery, subject, of course, to modifications by Congress. . . . The sources bearing on eighteenth-century English practice—reports and manuals—uniformly support the power not only to give a fixed allowance for the various steps in a suit, what are known as costs "between party and party," but also as much of the entire expenses of the litigation of one of the parties as fair justice to the other party will permit, technically known as costs "between solicitor and client."⁷

Although this general power to award attorneys' fees has thus resided within the federal court system for some time, in practice it has been used relatively sparingly and usually only within the confines of certain well established exceptions to the general rule. In fact, until recently only two such exceptions have accounted for the great majority of cases in which the courts have deemed it appropriate to award fees. The first of these may be termed the vexatious or unreasonable conduct rule. Under this rationale the courts have awarded fees to a litigant where his opponent has pursued an unfounded action or defense and has done so "in bad faith, vexatiously, wantonly or for oppressive reasons."⁸ The obvious purpose for awarding attorney fees in such a case is to protect the honest litigant and to discourage abuse of the court system.

5. *E.g.*, 7 U.S.C. § 210(f) (1970) (Packers and Stockyards Act of 1921); *id.* § 499g(b) (Perishable Agriculture Commodities Act of 1930); 45 U.S.C. § 153(p) (1970) (Railway Labor Act of 1926); 49 U.S.C. § 16(2) (1970) (Interstate Commerce Act of 1887).

6. *E.g.*, 15 U.S.C. § 77k(e) (1970) (Securities Act of 1933, allowing the court to award attorneys' fees if it "believes the suit or the defense to have been without merit . . ."); 35 U.S.C. § 285 (1970) (patent infringement suits, allowing the court to award attorneys' fees in "exceptional cases"); 42 U.S.C. § 3612(c) (1970) (Fair Housing Act of 1968, allowing the court to award fees provided that the plaintiff "in the opinion of the court is not financially able to assume said attorney's fees").

7. *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 164-65 (1939).

8. 6 J. MOORE, *FEDERAL PRACTICE* § 34.77[2] at 1709 (2d ed. 1971).

The second major court created exception, customarily referred to as the "common fund" doctrine, is premised upon the desire to avoid the unjust enrichment of others at the sole expense of the person who has provided them with a benefit. The basic rule may be summarized as follows: Where an individual, through his own litigative efforts, has protected or created a fund in which others have a beneficial interest, he normally will be awarded litigation expenses, including attorneys' fees, either from the fund itself or from some kindred source over which the court has jurisdiction to assess the beneficiaries for a share of the expenses proportionate to their interests.⁹

Application of the common fund doctrine is well illustrated by the frequently cited case of *Trustees v. Greenough*.¹⁰ There the plaintiff, a bondholder in the Florida Railway Company, brought suit on behalf of himself and all other holders of similar bonds against the present and former trustees of a fund which had been pledged *inter alia* for the payment of the interest accruing on the bonds. The bill charged that the trustees were wasting and destroying the fund by selling the trust property at a nominal price, and that in addition the trustees refused to provide for the payment of interest on the bonds. Plaintiff pursued the action to a successful conclusion and in so doing "secured and saved" a large portion of the trust fund. In addition, as the result of plaintiff's efforts, similarly situated bondholders were able to realize dividend payments which prior to the suit had been substantially in arrears. Against this background, then, the Court determined that it was appropriate to award the plaintiff attorneys' fees from the fund which he had protected:

[I]n a case like the present, where the bill was filed not only in behalf of the complainant himself but in behalf of the other bondholders having an equal interest in the fund; and where the bill sought to rescue that fund from waste and destruction . . . and to bring it into court for administration according to the purposes of the trust: and where all this has been done; and done at great expense and trouble on the part of the complainant; and the other bondholders have come in and participated in the benefits resulting from his proceedings—if the complainant is not a trustee, he has at least acted the part of a trustee in relation to the common interest It would not only be unjust to him, but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage. He has worked for them as well as for himself; if he cannot be reimbursed out of the fund itself, they ought to contribute their due proportion of the expenses which he has fairly incurred. To make them a charge upon the fund is the most equitable way of securing such contribution.¹¹

9. *Id.*

10. 105 U.S. 527 (1882).

11. *Id.* at 532.

The Movement Toward a New Fee Shifting Rationale

The three basic fee shifting exceptions discussed above—express statutory provision, the vexatious conduct rule and the “common fund” doctrine—have, until the emergence of the new “private attorney general” exception, with which this note is concerned, accounted for the great bulk of the fee transferring which has occurred in the federal courts. Thus, in the vast majority of cases, the courts have adhered to the general American rule of denying any award of fees to either of the litigants. The law was by no means completely rigid, however, and although the fundamental exceptions were retained as general guidelines, the courts managed to express their expanding notions of equity by increasingly liberalizing the bounds of these exceptions. Since these preliminary departures manifest much of the judicial sentiment which ultimately led to the “private attorney general” doctrine, it may be worthwhile to consider briefly a few of the more salient trends and cases.

Expanding Notions of Bad Faith

The expansion of the vexatious and unreasonable conduct exception is perhaps best illustrated by a series of relatively recent school desegregation cases. The primary introduction of fee shifting into the school desegregation area came in *Bell v. School Board*¹². In that case the lower court had granted plaintiff's request for injunctive relief aimed at preventing further racial discrimination in his school district but had denied an additional prayer for counsel fees. On appeal, the refusal to award fees was reversed. The appellate court reasoned that such an award was clearly justified in light of the school board's “long continued pattern of evasion and obstruction which included not only the defendants' unyielding refusal to take any initiative, thus casting a heavy burden on the children and their parents, but their interposing a variety of administrative obstacles to thwart the valid wishes of the plaintiff for a desegregated education.”¹³ *Bell* thus constituted a rather classic application of the unreasonable conduct rule.

In *Clark v. Board of Education*,¹⁴ decided three years after *Bell*, the desire for a more flexible fee shifting rationale was plainly evident. In that case, the court dealt with a pattern of resistance to school desegregation which was quite similar to that evidenced in *Bell*. The trial court in *Clark*, however, had granted plaintiff an award of attorneys' fees but only in the seemingly token amount of \$250. The court of appeals reluctantly affirmed, stating that “[w]hile we believe additional fees were warranted, we do not believe that this is such an extra-

12. 321 F.2d 494 (4th Cir. 1963).

13. *Id.* at 500.

14. 369 F.2d 661 (8th Cir. 1966).

ordinary case that we could validly hold that the trial court has abused its discretion. . . ."¹⁵ The court then went on to express its general impatience with the injustice of forcing individuals into court in order to vindicate clearly defined rights. In conclusion the court stated:

If well known constitutional guarantees continue to be ignored or abridged and individual pupils are forced to resort to the courts for protection, the time is fast approaching when additional sanction of substantial attorney fees should be seriously considered by the trial courts.¹⁶

Two years later, in *Cato v. Parham*,¹⁷ the admonition of the *Clark* court was to some extent followed. In *Cato* the court noted that although litigation aimed at ending the racial segregation in the defendant's school district had dragged on for nine years, it did not "impugn the Board's good faith in trying to carry out the [constitutional] mandate. . . ."¹⁸ Despite this fact, however, the court pointed out that it could not "be gainsaid that whatever progress has been made in the direction of desegregation . . . has followed judicial prodding,"¹⁹ and awarded attorneys' fees to the plaintiff in the amount of \$700.²⁰ At a minimum, *Cato* stood for a substantial expansion of the vexatious conduct rule. Bad faith on the part of the defendant, a traditional prerequisite of fee shifting under this rationale, was largely dispensed with. Instead, all that the court appeared to require was a showing that the defendant had precipitated litigation which should not have been necessary. In making this implicit ruling, then, the court significantly liberalized fee shifting policy: emphasis was no longer to be placed exclusively on the misconduct of the defendant; rather fees might also be awarded to alleviate the patent unfairness in making a citizen incur a heavy financial burden in order to realize a clearly defined constitutional right. Beyond inaugurating this new shift in policy, however, the court also exhibited a prescience of the further fee shifting developments which were soon to take place by citing as "suggestive" the then very recent Supreme Court decision in *Newman v. Piggie Park Enterprises*.²¹

The question in *Piggie Park* was what criteria should determine whether an attorney's fee award was justified in a suit under Title II of the 1964 Civil Rights Act.²² This act provides that:

15. *Id.* at 671.

16. *Id.*

17. 293 F. Supp. 1375 (E.D. Ark.), *aff'd*, 403 F.2d 12 (8th Cir. 1968).

18. *Id.* at 1378.

19. *Id.*

20. This amount was intended to compensate the plaintiffs for counsel fees incurred only during the last several months of the suit. Fees incurred before September 1967 were apparently deemed to be nonrecoverable under the law which existed prior to that time.

21. 390 U.S. 400 (1968).

22. 42 U.S.C. § 2000a (1970). This title of the act prohibits discrimination or

In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person.²³

The court of appeals apparently regarded the discretion to award fees granted by the statute as adding very little to the discretion which already existed in the courts under the traditional bad faith rule and instructed the district court accordingly.²⁴ The Supreme Court, however, did not agree. Instead it found that the attorney's fee provision of Title II was meant not simply to penalize bad faith litigants, but also to encourage private enforcement of high priority congressional policies. The Court reasoned as follows:

When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. A Title II suit is thus private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II.

It follows that one who succeeds in obtaining an injunction under that Title should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.²⁵

With this language, then, the Court gave birth to an entirely new fee shifting rationale. The fact that the opinion was extremely brief and that it was addressed solely to the Civil Rights Act may have initially obscured its full potential but, in any event, it was not long before its true germinal possibilities were in full bloom.²⁶

Expansion of the "Common Fund" Doctrine

As discussed previously, the "fund" doctrine received its impetus from the courts' desire to avoid unjust enrichments and under the

segregation in places of public accommodation based upon race, color, religion or national origin.

23. 42 U.S.C. § 2000a-3(b) (1970).

24. *Newman v. Piggie Park Enterprises, Inc.*, 377 F.2d 433, 437 (4th Cir. 1967).

25. 390 U.S. at 401-02.

26. See text accompanying notes 36-92 *infra*.

Trustees v. Greenough formulation of the rule,²⁷ the necessary ingredients were essentially a suit which devolved pecuniary benefits upon a class of persons and jurisdiction over a fund which made it possible for the court to spread the costs of litigation among the beneficiary class. In 1970 the Supreme Court, taking its cue from certain state court decisions, greatly expanded the scope of this exception by holding that the benefit accruing to the enriched class need not be monetary in nature.

*Mills v. Electric Auto-Lite Co.*²⁸ was an action by shareholders of the Electric Auto-Lite Company to dissolve the merger of their company with the Mergenthaler Linotype Company. Plaintiffs alleged that the merger vote had been materially influenced by a misleading proxy statement which had violated rule 14(a) of the Securities Exchange Act of 1934.²⁹ After successive appeals the Supreme Court found for the plaintiffs on the merits and remanded the case to the district court to determine what relief might be appropriate. In addition, however, the Court turned its attention to plaintiff's request for an interim award of attorneys' fees. The Court first reasoned that the request for attorneys' fees was not improper simply because plaintiffs had sued under a federal statute which made no express provision for such an award.³⁰ Instead, the Court felt that the crucial inquiry was whether the common fund doctrine might be applied in a case where the benefit accruing from petitioner's action was not of a pecuniary nature. The Court decided that it could. Justice Harlan reasoned, in essence, that the unjust enrichment rationale of the "fund" rule was not rendered invalid merely because the benefit to the shareholders was not capable of monetary valuation; rather, the doctrine remained basically operative so long as any "substantial benefit" was passed on to the shareholders.³¹ In defining "substantial benefit" Justice Harlan initially re-

27. See text accompanying notes 10-11 *supra*.

28. 396 U.S. 375 (1970).

29. 15 U.S.C. § 78n(a) (1970).

30. In this regard pains were taken to distinguish the case of *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967). In *Fleischmann* the Court had considered the appropriateness of awarding attorneys' fees in trademark infringement actions brought under the Lanham Act. This act "meticulously detailed" both the injunctive and compensatory remedies available in suits brought under its authority but made no mention whatsoever of attorneys' fees. 15 U.S.C. § 1117 (1970). The Court ruled that the thoroughness of the remedies which had been provided by the act manifested a congressional intent to limit the courts' remedial powers to those specific remedies. Accordingly, the Court held attorneys' fees could not be awarded. The *Mills* Court stated that it did not consider *Fleischmann* controlling since the express remedies provided by the Securities Exchange Act were, in comparison to the Lanham Act, only minimal. 396 U.S. at 391.

31. 396 U.S. at 392-95.

lied upon *Bosch v. Meeker Cooperative Light & Power Association*,³² where the Minnesota Supreme Court had held that:

[A] substantial benefit must be something more than technical in its consequence and be one that accomplishes a result which corrects or prevents an abuse which would be prejudicial to the rights and interests of the corporation or affect the enjoyment or protection of an essential right to the stockholders' interest.³³

Nevertheless, in discussing the specific service which plaintiffs allegedly had rendered to the Electric Auto-Lite Company, the Court used language which seemingly possessed far greater import than the innocuous sounding test established by *Bosch*.

[T]he stress placed by Congress on the importance of fair and informed corporate suffrage leads to the conclusion that, in *vindicating the statutory policy*, petitioners have rendered a substantial service to the corporation and its shareholders. . . . Whether petitioners are successful in showing a need for significant relief may be a factor in determining whether a further award should later be made. But regardless of the relief granted, private stockholder's actions of this sort "involve Corporate therapeutics," and furnish a benefit to all shareholders by providing an important means of enforcement of the proxy statute.³⁴

This rationale was indeed a far cry from the traditional fund doctrine. Not only was no fund protected or brought into being, but conceivably the corporation might have received no benefit whatsoever other than the "general therapeutics" of enhanced law enforcement, and this "benefit" was largely shared by stockholders of all corporations. As such, the award of fees in *Mills* may be construed as being based upon the conferral of benefits to the public at large and not merely to the shareholders of the Electric Auto-Lite Corporation; the language is somewhat ambiguous but the potential for such an interpretation clearly is present.³⁵ Thus, while the Court may have intended to award fees on the basis of a somewhat liberalized common fund doctrine, its ultimate holding suggested a far different rationale.

32. 257 Minn. 362, 101 N.W.2d 423 (1960).

33. *Id.* at 366-67, 101 N.W.2d at 427.

34. 396 U.S. at 396 [emphasis added].

35. The legitimacy of such an interpretation is further supported by one commentator who wrote: "In accepting the rulings of *Abrams* and *Bosch*, together with the Hornstein terminology, the *Mills* Court legitimized a stockholder's suit fee exception based solely on law enforcement policy considerations. The Court was concerned not with the benefit of this suit to these shareholders, but with the benefit of this type of suit to the public interest. . . ." Note, *The Allocation of Attorneys' Fees After Mills v. Electric Auto-Lite Co.*, 38 U. CHI. L. REV. 316, 327 (1971). The same writer also pointed out that more than fifty percent of Electric Auto-Lite's shareholders were, in fact, *opposed* to the enforcement of the Securities Exchange Act's regulations. *Id.* at 333. See also *Lee v. Southern Home Sites Corp.*, 444 F.2d 143, 145 (5th Cir. 1971), which is discussed in the text accompanying note 47 *infra*.

Exactly how the lower courts would construe *Mills*, however, remained to be seen.

The Formal Break with Tradition

In *Mills* and *Piggie Park* the federal courts were confronted by two related departures from the traditional exceptions to the no-fee-shifting rule. That is, each case appeared to allot the prevailing plaintiff attorneys' fees based primarily upon his vindication of congressional policy. Granting that each case, on its face, operated within a relatively narrow ambit—*Piggie* applying directly only to the specific fee granting discretion provided by Title II of the 1964 Civil Rights Act and *Mills* only to shareholders suits brought under section 14(a) of the Securities Exchange Act—nonetheless, in juxtaposition the two cases strongly suggested a new rationale for a generally applicable exception. In a series of three cases decided shortly after *Mills* this suggestion was extensively considered and in at least two instances followed.

*Bradley v. School Board*³⁶ was a school desegregation action which was originally decided on May 26, 1971, by the United States District Court for the Eastern District of Virginia. Although this opinion was later reversed by the Court of Appeals for the Fourth Circuit,³⁷ it continues to merit scrutiny as the first decision to coalesce the *Piggie Park* and *Mills* rulings into an entirely novel fee shifting rule. *Bradley* was a class action which had continued over the course of sixteen years in an attempt to end racial segregation in the public schools of Richmond, Virginia. The attitude of the Richmond school board during those years was aptly characterized by the court as follows: "At each stage of the proceedings the School Board's position has been that, given the choice between desegregating the schools and committing a contempt of court, they would choose the first, but that in any event desegregation would only come about by court order."³⁸ As a result of this type of opposition the plaintiffs were forced to maintain legal pressure on the school board members until they finally submitted an acceptable desegregation plan.

Following the court's implementation of this plan, plaintiffs filed a motion for the additional relief of attorneys' fees. Since the action had been brought under 42 U.S.C. section 1983³⁹ which made no express mention of such fees, the court was forced to consider its ability to grant plaintiffs' request on the basis of its general equity powers.

36. 53 F.R.D. 28 (E.D. Va. 1971), *rev'd*, 472 F.2d 318 (4th Cir. 1972).

37. The opinion of the Fourth Circuit reversing the district court decision seems quite unsound; it is discussed separately in the text accompanying notes 105-135 *infra*.

38. 53 F.R.D. at 39.

39. 42 U.S.C. § 1983 (1970).

In doing so it exhaustively reviewed the traditional equity tests for shifting fees and concluded first, that the fund theory was an inappropriate rationale for this type of suit:

School desegregation cases, or any suits against governmental bodies, do not fit this fund model without considerable cutting and trimming. This is a class suit to be sure, with class relief, but to say that the plaintiff class will actually in effect pay their attorneys if the school board is made to pay counsel fees entails a number of unproved assumptions about the extent of which pupils pay for their free public schooling.⁴⁰

The court next turned to the bad faith test and concluded that it was a valid basis for awarding fees in this case. The court stated that "[w]hen parties must institute litigation to secure what is plainly due them, it is not unfair to characterize a defendant's conduct as obstinate and unreasonable. . . ."⁴¹

The court was not content, however, to base its award of fees solely upon this finding. Rather, it went on to fashion an alternative ground for its holding. In creating this independent ground for awarding fees the court looked first to *Piggie Park* and suggested that the same policy factors which had prompted the Supreme Court's decision in that case often were present in even greater degree in school desegregation litigation.⁴² For example, desegregation suits are, like Title II actions, of a quasi-public nature. This is so, the court implied, not only because school discrimination suits generally are brought as class actions and therefore affect the rights of many individuals but also because they serve to implement the "vital" governmental policy that civil rights in the schools "be protected" and in fact immediately vindicated.⁴³ Furthermore, the court noted that although the national goal of school integration had been partially enforced by administrative proceedings, a large share of the burden of implementing school integration had fallen on the courts in the form of suits brought by private individuals.

Interestingly, the *Bradley* court seemed to go beyond the basic rationale of the *Piggie Park* holding—namely, that attorneys' fees should be awarded to plaintiffs as a means of encouraging certain types of litigation—to apparently suggest that the attorneys who handle these actions should be considered primarily in the service of the court, instead of their respective clients, and therefore should not have to look to the private litigants at all for their compensation:

The private lawyer in [school desegregation suits] most

40. 53 F.R.D. at 35-36.

41. *Id.* at 39.

42. *Id.* at 41.

43. *Id.* at 41-42.

accurately may be described as a "private attorney general." Whatever the conduct of defendants may have been, it is intolerably anomalous that counsel entrusted with guarantying the effectuation of a public policy of non-discrimination as to a large proportion of citizens should be compelled to look to himself or to private individuals for the resources needed to make his proof. . . .

Where the interests of so many are at stake, justice demands that the plaintiffs' attorneys be equipped to inform the court of the consequences of available choices; this can only be done if the availability of funds for representation is not left to chance.⁴⁴

In *Bradley*, then, the court's position is apparently that plaintiffs' counsel should be compensated by the state rather than by either of the parties to the action. This was indeed a novel departure from standard concepts in fee shifting. Nevertheless, since a state agency was a defendant to the action, and hence, under traditional fee shifting, the state would also have sustained the burden of plaintiff's attorneys' fees, the full potential impact of the *Bradley* holding was not apparent. Aside from this fact, the district court opinion in *Bradley* did stand unequivocally for a broad application of the basic *Piggie Park* rationale. Regardless of whether statutory authority to shift fees existed, the policy of encouraging the vindication of strong governmental interests was an appropriate basis upon which to do so.

In *Lee v. Southern Home Sites Corp.*,⁴⁵ decided less than a month after *Bradley*, the United States Court of Appeals for the Fifth Circuit dealt with the question of attorneys' fees in the context of a suit brought under 42 U.S.C. section 1982.⁴⁶ This statute, like section 1983 with which the *Bradley* court was faced, makes no express provision for awarding attorneys' fees. The facts of the case presented a clear cut instance of racial discrimination. Southern Home Sites, a Mississippi company engaged in the business of real estate development, was running a campaign to develop a site near Ocean Springs, Mississippi. As part of its campaign Southern had mailed form letters in which it had offered to sell to the recipient a lot purportedly worth \$600 for \$49.50 in cash; the only condition for eligibility was that the buyer "be a member of the white race." Lee, a black man, received one of the promotional letters and tendered an offer of \$49.50 to Southern. Southern refused to accept and Lee brought suit.

In the district court Lee succeeded in securing an injunction against future discrimination by the defendant; however, his additional motion

44. *Id.* at 42.

45. 444 F.2d 143 (5th Cir. 1971).

46. This statute originally was enacted as part of the Civil Rights Act of 1866. It provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982 (1970).

for an award of counsel fees was refused. The court reasoned that since the statute did not provide for such an award and since Southern's defense against Lee's suit had not been sufficiently "malicious, oppressive or so unreasonable and obdurately obstinate" to call the "vexatious conduct" rule into play, no award of fees was justified.

On appeal the district court's denial of fees was reversed. The appellate court noted in passing that in view of certain facts bad faith could be attributed to defendant's continued litigation after a certain point in the proceedings; however, it chose to base its holding upon a "broader ground"—namely, that awarding attorneys' fees is an appropriate means for the federal courts to use in effectuating congressional policy. In justifying this holding the court relied principally on *Mills*, *Piggie Park* and certain federal statutes which allowed the award of attorneys' fees and which the court felt embodied legislative policies which were closely analagous to those supporting section 1982. Looking first to *Mills*, the court acknowledged that, at least formally, the decision had spoken in terms of shareholder's suits and the unjust enrichment rationale. Nevertheless, by turning to the more expansive construction to which the *Mills* decision is susceptible, the court reasoned that the decision "is better understood as resting heavily on its acknowledgement . . . that private suits are necessary to effectuate congressional policy and that awards of attorney's fees are necessary to encourage private litigants to initiate such suits."⁴⁷ The court then concluded that "here as in *Mills* there is a strong congressional policy behind the rights declared in section 1982. Awarding attorney's fees to successful plaintiffs would facilitate the enforcement of that policy through private litigation."⁴⁸

For additional support of its holding, the court looked to other federal acts which it regarded as embodying policies similar to those implemented by section 1982, and which expressly provided for the award of attorneys' fees. These included the Fair Housing Law⁴⁹ and the Public Accommodations and Equal Employment Opportunities sections of the 1964 Civil Rights Act.⁵⁰ The court argued that "[i]n fashioning an effective remedy for the rights declared by Congress one hundred years ago, courts should look not only to the policy of the enacting Congress but also to the policy embodied in closely related legislation. Courts work interstitially in an area such as this."⁵¹ In final abutment of its decision the court turned to *Piggie Park*. After quoting extensively from that opinion, the court concluded: "To en-

47. 444 F.2d at 145.

48. *Id.*

49. 42 U.S.C. § 3612(c) (1970).

50. *Id.* § 2000a-3(b), § 2000e-5k (1970).

51. 444 F.2d at 146.

sure that individual litigants are willing to act as 'private attorneys general' to effectuate the public purposes of the statute, attorney's fees should be as available as under [the Fair Housing Act]."⁵² Thus *Lee*, like the district court opinion in *Bradley*, proceeded upon the rationale that private suits were a valid and indeed necessary means of enforcing certain congressional policies and that awarding attorneys' fees therefore was justified as a means of encouraging such enforcement.

The third opinion to consider the new fee shifting rationale in some detail was the Fourth Circuit case of *Brewer v. School Board*.⁵³ In this case plaintiffs had brought suit to contest the adequacy of a revised plan of desegregation which had been approved by the district court. The court of appeals dismissed all of plaintiffs' attacks on the plan except one: its failure to provide free bus transportation to pupils who were assigned to schools beyond walking distance from their homes. On this point the court was persuaded by plaintiffs' argument that such transportation was a necessary incident to any plan for school integration. Forcing the reassigned students to ride the public bus system, the plaintiffs had urged, would impose an "unreasonable, if not an intolerable burden" upon a substantial number of the affected families. In response to these arguments the court ordered the school board to provide free transportation for the students who were assigned to schools outside their neighborhoods.

The court next focused its attention on plaintiff's request for attorneys' fees. Since the section of the civil rights laws under which plaintiffs had sued did not provide for attorneys' fees awards,⁵⁴ the court looked to the various equity rules. Application of the bad faith exception was rejected on the ground that the court found no "compelling circumstances" to overturn the district court's finding that the board had made "a good faith effort at desegregation." Also, in a lengthy footnote, the court said that the private attorney general doctrine would not seem to apply in school desegregation cases.⁵⁵ In reaching this conclusion the court characterized *Lee* and *Miller v. Amusement Enterprises, Inc.*,⁵⁶ a case which essentially had duplicated the *Piggie Park* holding, as resting primarily upon a specific need to privately enforce certain statutory rights. For example, the court stated that the reason for the ruling in *Lee* "was that the right asserted by the complainant, though involving public policy, 'under present judicial development, depends entirely on private enforcement.'"⁵⁷ In contrast

52. *Id.* at 148.

53. 456 F.2d 943 (4th Cir.), *cert. denied*, 406 U.S. 933 (1972).

54. 42 U.S.C. § 2000c (1970).

55. 456 F.2d at 950 n.22.

56. 426 F.2d 534 (5th Cir. 1970).

57. 456 F.2d at 950 n.22.

to *Lee* and *Miller* the court pointed out that in the school desegregation area the United States Attorney General was empowered to pursue any "meritorious" action on behalf of any person who, in the attorney general's opinion, was unable to "bear the expense of the litigation." Furthermore, the court noted, "the Department of Health, Education and Welfare has a responsibility to see that every school receiving any federal assistance (and, for practical purposes, it may be assumed all do) is desegregated."⁵⁸

Finally, however, basing its decision upon what it termed a "quasi-application of the 'common fund' doctrine," the court held that an award of counsel fees to plaintiff was in fact justified. The court delineated its reasoning as follows:

The students have secured a right [of free transportation] worth approximately \$60 per year to each of them. This *pecuniary* benefit to the students involved would, under normal circumstances, warrant the imposition of a charge against them for their proportionate share of a reasonable attorney's fee incurred in securing such *pecuniary* benefit for them. It is not practical, however, to do this in this case and, too, to do so would defeat the basic purpose of the relief provided by the amendment in the decree, which was to secure for the student concerned transportation *without cost or deduction*. The only feasible solution in this peculiar situation would seem to lie in requiring the school district itself to supplement its provision of free transportation with payment of an appropriate attorney's fee to plaintiffs' attorneys for securing the addition of such a provision to the plan of desegregation.⁵⁹

This argument would indeed seem to stray far from the common fund theory. In fact, the court would appear to expressly negate any intent to achieve the basic purpose of the fund theory—the avoidance of unjust enrichment. Instead it apparently reasoned that since plaintiffs had, in effect, conferred a pecuniary benefit upon their class, they were entitled to have their attorneys' costs paid, if not by the beneficiary class, then by the defendant. Any nexus between this reasoning and the traditional fund doctrine is extremely tenuous to say the least.

In his special concurrence, Judge Winter, recognizing that there were "grave" conceptual difficulties with the majority's reasoning, looked to *Piggie Park* for a firmer basis for awarding fees. He asserted that the policy behind *Piggie Park* was directly applicable to school desegregation cases, and in response to the majority's argument that such policies were adequately protected by public enforcement agencies, Judge Winter noted that

[d]espite the extensive enforcement responsibilities the statutes place on the Departments of Justice and Health, Education and

58. *Id.* at 951-52.

59. *Id.*

Welfare and their immense resources, we know from the cases which come before us that they have been unable to shoulder the entire burden of litigation to make *Brown I* fully effective. The Department of Justice has not appeared in this stage of this very case.⁶⁰

Judge Winter continued by observing that almost the entire financial burden of the suit had fallen on plaintiffs and the nonprofit organization which had provided plaintiffs with counsel. He concluded: "The time is *now* when those who vindicate these civil rights should receive fair and equitable compensation from the sources which have denied them. . . ."⁶¹

Although it is apparent that the majority opinion in *Brewer* did not promote the conceptual clarity of the emerging attorneys' fees law, it did provide additional proof of two significant facts: first, that a number of federal courts are strongly inclined to award attorneys fees to prevailing complainants in some circumstances which are not covered by the traditional fee shifting rules; and second, that the courts have been unable to settle upon a single fee shifting rationale which would accommodate all of these inclinations. The law thus awaited further developments.

Recent Applications of the New Exception

Against the background of *Bradley*, *Lee* and *Brewer*, four district court cases very recently have been decided which have added both clarity and new dimensions to the private attorney general concept in fee shifting. The first of these, *Sims v. Amos*,⁶² was decided March 17, 1972 by the federal district court for the middle district of Alabama. There the question of attorneys' fees arose in the context of an action to secure reapportionment of the state legislature. Plaintiffs had contended that the Alabama legislature was malapportioned so as to deny them their constitutional right to equal suffrage. The three judge district court ruled that plaintiffs had proved their allegation and accordingly ordered the implementation of plaintiffs' proposed reapportionment plan.

The court found little difficulty in justifying an award of attorneys' fees to plaintiffs under the traditional bad faith test. It noted that "[t]he history of the present litigation is replete with instances of the Legislature's neglect of, and even total disregard for, its constitutional obligation to reapportion."⁶³ In addition, the court pointed out

60. *Id.* at 954.

61. *Id.*

62. 340 F. Supp. 691 (M.D. Ala. 1972).

63. *Id.* at 693-94.

that bad faith might be attributed to the defendant's "submissions of obviously unacceptable" reapportionment plans. The court, however, chose to base its award of fees "on far broader considerations of equity." Specifically, it looked to the precedents of *Piggie Park*, *Mills*, *Lee* and *Bradley*,⁶⁴ and rendered the following rule:

If, pursuant to this action, plaintiffs have benefited their class and have effectuated a strong congressional policy, they are entitled to attorneys' fees regardless of defendant's good or bad faith. Indeed, under such circumstances, the award loses much of its discretionary character and becomes a part of the effective remedy a court should fashion to encourage public-minded suits . . . and to carry out congressional policy.⁶⁵

In applying these criteria to the case before it the court was fully satisfied that the plaintiffs had indeed functioned as private attorneys general.

No other right is more basic to the integrity of our democratic society than is the right plaintiffs assert here to free and equal suffrage. In addition, congressional policy strongly favors the vindication of federal rights violated under color of state law, 42 U.S.C. § 1983, and, more specifically, the protection of the right to a non-discriminatory franchise.⁶⁶

Besides these considerations, the court also pointed out that courts should encourage this particular type of private litigation since the expenses are great and the chances of a substantial damage award are minimal. "Consequently," the court concluded, "in order to attempt to eliminate these impediments to *pro bono publico* litigation, such as is here involved, and to carry out congressional policy, an award of attorneys' fees is essential."⁶⁷

Sims' chief significance is found in the new formulation which it gives to the private attorney general doctrine. Choosing not to rely on any single precedent, the court apparently tried to coalesce the private attorney general concept of *Piggie Park* and the benefit language found in *Mills*. The conceptual success of the resulting hybrid formulation would seem to be open to considerable doubt. Requiring a showing of both statutory vindication *and* a class wide benefit, would seem to entail a largely redundant demonstration. That is, in most cases the act of vindicating congressional policy will ipso facto confer a benefit upon plaintiff's class. In *Sims*, for example, vindication and benefit both inhere in the single act of achieving equal apportionment.

64. The court's reliance upon these cases was express: "The present case clearly falls among those meant to be encouraged under the principles articulated in *Piggie Park Enterprises, Inc.* and *Mills*, and expanded upon in *Southern Home Sites* and *Bradley*." *Id.* at 694.

65. *Id.*

66. *Id.*

67. *Id.* at 695.

Beyond this conceptual awkwardness, however, the absolute requirement that there be a class benefit, *in addition* to the general vindication of congressional policy, would seem to be an unnecessary restriction on the *Piggie Park* rationale. There the Supreme Court determined that awarding attorneys fees might be premised solely on the ground that it was in the public interest to encourage the enforcement of certain federal laws. No additional requirement that plaintiffs benefit a particular class of individuals was deemed necessary. The *Sims* formula, then, would seem to append a superfluous and unwarranted prerequisite to the *Piggie Park* test.

Exactly one week after *Sims* was decided a court from the same judicial district again used the private attorney general doctrine to award counsel fees to the prevailing plaintiff. In *NAACP v. Allen*,⁶⁸ petitioners brought a class action alleging that the Alabama Departments of Public Safety and Personnel had followed "a continuous and pervasive pattern and practice of excluding Negroes from employment in the Department of Public Safety."⁶⁹ After finding for plaintiffs, the court ordered *inter alia* that the defendants employ one black trooper for every white trooper hired until approximately one-quarter of the Alabama state troopers were black. In addition to this relief, the court, in a supplemental order dated March 24, 1972, also taxed the cost of plaintiffs' attorneys against the defendants.⁷⁰

The justification of this award followed very closely the pattern which had been set in *Sims*. Here, as in that case, the court first stated that the fees could be shifted on the basis of defendants' "unreasonable and obdurate conduct"; but again it chose to base its holding on the broader foundation of the private attorney general doctrine. The court also used essentially the same formulation of the doctrine that had been used in *Sims*. Thus, it looked for, and found, both a benefit to plaintiff's class—*i.e.*, increased employment opportunities and relief from the "badge of opprobrium which necessarily attaches to a group excluded" from particular types of employment on the basis of race⁷¹—and the vindication of "strong" federal rights—namely, "the enforcement and protection of the right of equal job opportunities."⁷² Finally, the court again sought to emphasize the need to positively encourage such suits by pointing to their generally unremunerative nature and their potential for subjecting plaintiffs' counsel to "social, political and community" ostracism. *Allen* thus constitutes a virtual duplication of the *Sims*

68. 340 F. Supp. 703 (M.D. Ala. 1972).

69. *Id.* at 704.

70. *Id.* at 707-08.

71. *Id.* at 709.

72. *Id.* at 709-10.

rationale. It reaches an admirable result, but again it does so on the basis of a redundant and unnecessarily restrictive statement of the private attorney general test.

The third decision to apply the private attorney general concept was *Wyatt v. Strickney*.⁷³ In that case, an action was brought on behalf of residents of the Partlow State School and Hospital for the mentally retarded. Petitioners contended that the defendant hospital was being operated in a manner which deprived the residents of their right to have rehabilitative training and care which met minimum constitutional standards. The court sustained plaintiffs' allegations and in a long and detailed appendix to its holding delineated the minimum standards of care and training which were to be afforded at the Partlow facility. Then, in an opinion attached at the end of the appendix, the court considered the question of attorneys' fees.

Chief Judge Johnson, who had also written the *Allen* decision, began by holding that the evidence adduced at trial indicated sufficient bad faith on the part of defendants to justify an award of fees to the plaintiffs. Nonetheless, as in both *Sims* and *Allen*, the court went on to find its primary fee shifting rationale in the realm of more expansive policy considerations. Interestingly, in explicating the specific policy factors which purportedly justified awarding fees to the plaintiffs, Judge Johnson did not revert back to the hybrid tests of *Sims* and *Allen*. Instead he chose to break new ground by proceeding upon what he termed "a kind of benefit theory." He explained:

Plaintiffs bringing suits to enforce a strong national policy often benefit a class of people far broader than those actually involved in the litigation. Such plaintiffs, who are said to act as "private attorneys general" . . . rarely recover significant damage awards. . . . Consequently, in order to eliminate the impediments to *pro bono publico* litigation and to carry out congressional policy an award of attorneys' fees not only is essential but also legally required.⁷⁴

This formulation of the rule marked two significant departures from the test used in *Allen* and *Sims*. The first of these was an expansion of the court's inquiry into the benefits allegedly conferred by plaintiffs' action. In *Sims* and *Allen* the court had confined its examination to those benefits received by the class of persons actually involved in the litigation; in *Wyatt*, on the other hand, the inquiry was broadened to include a review of all societal benefits resulting from the

73. 344 F. Supp. 387 (M.D. Ala. 1972). This action resulted from the expansion of an earlier suit of the same name which had been brought to upgrade the standards of care and rehabilitative training available at an Alabama mental hospital. See *Wyatt v. Strickney*, 344 F. Supp. 373 (M.D. Ala. 1972).

74. 344 F. Supp. at 409.

action. This shift in approach is particularly evident in the court's discussion of the specific benefits flowing from plaintiffs' suit:

By successfully prosecuting this suit, plaintiffs have benefitted not only the present residents of Bryce, Partlow and Searcy but also everyone who will be confined to these institutions in the future. Veritably, it is no overstatement to assert that all of Alabama's citizens have profited and will continue to profit from this litigation. So prevalent are mental disorders in our society that no family is immune from their perilous incursion. Consequently, the availability of institutions capable of dealing successfully with such disorders is essential and, of course, in the best interest of all Alabamians.⁷⁵

Secondly, in focusing exclusively upon the general societal benefits of plaintiffs' action, *Wyatt* also stands for a movement away from the strict requirement of vindicating congressional policy per se. That is, the invocation of a federal statute which is supported by a "strong" congressional policy would not appear to be necessary under the court's rationale since the *Wyatt* suit apparently was predicated solely upon the due process guarantees of the Constitution. Thus, *Wyatt* would seem to reduce the determinative criterion for fee shifting under the private attorney general doctrine to that of merely having provided a substantial benefit to a broad section of the public.⁷⁶

One final feature of *Wyatt* also should be noted. In concluding its discussion of the "kind of benefit" theory, the court invoked the unjust enrichment reasoning of the common fund cases:

[T]he expenses . . . incurred in vindicating the public good were considerable. To burden only plaintiffs with these costs not only is unfair but also is legally impermissible. . . . Considerations of equity require that those who profit share the expense. In this case the most logical way to spread the burden among those benefitted is to grant attorneys' fees.⁷⁷

Although the court failed to indicate the extent to which it relied upon this unjust enrichment argument, this rationale would seem to be intended as mere auxiliary support for the court's primary encouragement-of-public-interest-litigation rationale. This conclusion is supported by the fact that the court cited as authority *Lee*⁷⁸ where, as indicated above, attorneys' fees were assessed against a private party defendant, so that there was no possible pretext of taxing the beneficiaries

75. *Id.*

76. Seemingly, under such an approach the enforcement of a statute embodying a strong public policy would constitute but one of many possible avenues to achieving the broad public benefit necessary to shift fees. For a further discussion of the advisability of such an approach see text accompanying notes 93-99 *infra*.

77. 344 F. Supp. at 409. Since a state agency was the defendant in this action, and also the primary beneficiary of the suit, the state would have paid plaintiffs' attorneys' costs regardless of which fee shifting rationale the court ultimately used.

78. 444 F.2d 143 (5th Cir. 1971).

for the costs of the suit. Looking to the court's primary rationale, then, *Wyatt* clearly would seem to offer a simplified, all purpose approach to the "private attorney general" doctrine.

Another case which quite recently has considered the new fee shifting doctrine is *La Raza Unida v. Volpe*.⁷⁹ In this action, decided October 19, 1972, plaintiffs sued to recover litigation expenses incurred in an earlier action against the same defendants. In the prior case⁸⁰ plaintiffs had brought a class action against, among others, the California Department of Highways for failing to comply with certain federal statutes in its pursuance of California Highway Project 238. Specifically, plaintiffs had alleged that the defendants failed to file with the Secretary of Transportation a statement relating to the environmental impact of the highway project as required by various regulations issued pursuant to section 4(f) of the 1966 Department of Transportation Act,⁸¹ and, further, that the state had violated various provisions of another federal statute⁸² by not having established an adequate relocation assistance program for persons who would be displaced by the project. Plaintiffs prevailed on the merits, and the court enjoined further land acquisition and resident removal in conjunction with the highway project until defendants had complied with the statutory requirements.

In the subsequent action for attorneys' fees, Judge Peckham, after concluding that neither the obdurate behavior rule nor the common fund exception provided an appropriate rationale for shifting fees, turned to the private attorney general concept. Citing *Lee*, *Allen* and *Sims* as general authority, Judge Peckham articulated his version of the rule as follows:

[W]henever there is nothing in a statutory scheme which might be interpreted as precluding it, a "private attorney general" should be awarded attorneys' fees when he has effectuated a strong Congressional policy which has benefitted a large class of people, and where further the necessary and financial burden of private enforcement are such as to make the award essential.⁸³

Applying these criteria to the actual facts of the case, Judge Peckham first determined that a strong congressional policy had indeed been effectuated. He asserted that "[t]he Court could cite numerous judicial and legislative utterances that dramatically portray the strength of these public policies,"⁸⁴ and, to illustrate, he provided three examples.

79. *La Raza Unida v. Volpe*, Civ. No. C-71-1166 RFP (N.D. Cal. Oct. 19, 1972).

80. *La Raza Unida v. Volpe*, 337 F. Supp. 221 (N.D. Cal. 1971).

81. 49 U.S.C. § 1653(f) (1970).

82. 23 U.S.C. § 501 (1970).

83. *La Raza Unida v. Volpe*, Civ. No. C-71-1166 RFP at 6 (N.D. Cal. Oct. 19, 1972).

84. *Id.* at 7.

On environmental protection, he quoted from Justice Black's concurring opinion in *Citizens to Preserve Overton Park v. Volpe*⁸⁵ to the effect that section 4(f) of the Department of Transportation Act represented "a solemn determination of the highest law-making body of this nation" that public highways should not be allowed to encroach upon park lands without a prior policy evaluation by the Secretary of Transportation.⁸⁶ And, on relocation assistance, he quoted policy statements from 23 U.S.C. section 501 and Title II of the Uniform Relocation Assistance Act⁸⁷ which indicate that it was Congress's desire to insure that a few individuals do "not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole."⁸⁸

The deficiency of these examples is that they do not "dramatically portray" the *strength* of the policies in question; at most they merely indicate that the policies exist in a degree sufficient to warrant legislation. Thus, if the court's intent was, in fact, to provide some criteria or evidence which would justify differentiating federal statutes on the basis of the relative strength of their respective policy goals, it would not appear to have achieved its aim.

The second prerequisite for awarding fees suggested by the court was that the action benefit a large class of people. In contrast to the *Sims* and *Allen* requirement that the plaintiff specifically benefit the class he represented, the *La Raza* court adopted, in effect, the *Wyatt* approach of looking to the benefit to society in general. Accordingly, in finding that plaintiffs had also satisfied this requirement, the court noted several forms of benefit devolving from plaintiffs' action such as: the obvious benefit to "those 5000 people about to be uprooted from their homes," the benefit to the "200,000 residents of Hayward, Union City and Fremont" in being guaranteed that their parks will not be destroyed until appropriate policy determinations are made, and the state-wide "therapeutics" that result from the California Highway Department's compliance with the federal statutes and regulations.⁸⁹

Finally, the court turned to the questions of whether it was necessary to spur private enforcement of the laws invoked by plaintiff, and, if so, whether the financial burden on plaintiffs was sufficiently severe to make an award of fees essential. Here again the court responded affirmatively to both inquiries. The need for private enforcement was

85. 401 U.S. 402 (1971).

86. *Id.* at 421.

87. 42 U.S.C. § 4621 (1970).

88. This wording is used in both 23 U.S.C. § 501 (1970) and 42 U.S.C. § 4621 (1970).

89. *La Raza Unida v. Volpe*, Civ. No. C-71-1166 RFP at 8 (N.D. Cal. Oct. 19, 1972).

present, the court suggested, "[b]ecause of the limited resources and potentially conflicting interests within and among governmental entities. . . ."⁹⁰ Whenever such entities are involved as defendants, "only private citizens can be expected to 'guard the guardians.'"⁹¹ As to the need to alleviate the financial burden on plaintiffs, the court noted that:

exhortations toward citizen participation can sound somewhat hollow against the background of the economic realities of vigorous litigation. In many "public interest" cases only injunctive relief is sought, and the average attorney or litigant must hesitate, if not shudder, at the thought of "taking on" an entity such as the California Department of Highways, with no prospects of financial compensation for the efforts and expenses rendered. The expense of litigation in such cases poses a formidable, if not insurmountable, obstacle.⁹²

Based on all of these findings, then, the court concluded that an award of fees to plaintiff was appropriate as a means of effectuating strong congressional policy.

Discussion: Achieving a Uniform Rule

In tracing the progression of cases from *Piggie Park* through *La Raza*, it is readily apparent that a number of federal courts are quite willing to accept and utilize the general concept of the private attorney general as a basis for transferring the burden of litigation expenses. What is also readily seen, however, is that to date the application of this doctrine has been marked by a considerable amount of variation and seeming confusion. Specifically, the cases have reflected wide divergence as to (1) the underlying rationale of the doctrine—alternatively relying on "vindication of strong congressional policies," avoidance of unjust enrichment, promotion of general "societal therapeutics," or some combination thereof—and (2) the construction and degree of significance to be accorded the requirement of a "need for private enforcement." Some degree of judicial discordance undoubtedly is inevitable at the inception of any new doctrine or principle of law. Although such divergence manifests a healthy independence of thought within the federal court system, it may be useful to essay a comprehensive formulation of the private attorney general fee shifting doctrine in the hope of promoting a rule which is founded upon a sound analytical base and which concomitantly fosters a substantial degree of predictability in its application.

The initial task in attempting to devise such an all-purpose rule is that of appropriately identifying its underlying purpose. As indicated

90. *Id.* at 9.

91. *Id.* at 10.

92. *Id.*

above, the cases which have dealt with this task to date seemingly have awarded attorneys' fees on the basis of three divergent, albeit overlapping, rationales, namely, encouraging the enforcement of strong congressional policies, avoiding unjust enrichments and, most expansively, encouraging the advancement of broad public interests.⁹³

In looking toward the formulation of a single private attorney general rule, it appears that only the last of these rationales offers a fully workable policy base. The first rationale—encouraging the enforcement of strong congressional policies—would seem unacceptable in that it is both unnecessarily restrictive in one sense and overly broad in another. It is unnecessarily limited because it requires that the action be brought pursuant to a federal statute. Such a requirement would seem to imply that policies codified by federal statutes possess some unique quality which makes them particularly suited to private enforcement. Nevertheless, it is difficult to conceive of what this quality might be, or how it generally would distinguish such suits from public interest actions brought, for example, to vindicate constitutional rights which are not otherwise codified.⁹⁴ The *Wyatt* case appears to be directly in point in this respect. There the highly commendable result achieved by plaintiffs' suit rested solely upon the broad constitutional concept of due process. Thus the award of fees in that case may not, in fact, be attributed to the enforcement of congressional policy per se,⁹⁵ but must be said simply to have reflected the court's determination that the plaintiffs' action was of such a socially desirable nature that similar suits also should be encouraged.

The second deficiency of the encouragement-of-strong-congressional-policies rationale is found in its apparent willingness to award fees in *all* suits brought to enforce certain federal statutes, *i.e.*, those statutes allegedly infused with a strong congressional policy. The obvious drawback of this failure to discriminate among individual cases is that it may encourage the bringing of nuisance suits based upon mere technical violations of the favored statutes. Such a result would be

93. This latter rationale would seem to accurately characterize the *Wyatt* decision for the reasons discussed in the text accompanying note 76 *supra*.

94. It is also difficult to see how suits predicated on federal statutes are generally more deserving of attorneys' fees awards than many diversity suits which are based upon state statutes or common law. Admittedly a ruling pursuant to a federal statute has, in theory, nationwide legal significance. Yet, its practical significance may, due to the uniqueness of the fact situation involved, be wholly confined to a particular state or locality. Where this is the case, a diversity action involving state law conceivably could achieve the same beneficial result and, hence, would appear to be just as deserving of an award of fees.

95. It is interesting to note in this regard that the *Wyatt* court, at one point in its opinion, uses the phrase "national policy" in lieu of the standard term "Congressional policy." 344 F. Supp. at 409.

particularly unfortunate in the context of a rule supposedly designed to promote *pro bono publico* actions.

The second rationale mentioned in the private attorney general cases, that of avoiding unjust enrichment, also would seem to be an unsuitable basis for a comprehensive rule. Although the avoidance of unjust enrichment is certainly a valid policy consideration in itself, applicability is found in cases where the defendant is the actual beneficiary of the action,⁹⁶ or where the court has jurisdiction over a fund which allows it to assess the ultimate beneficiaries for plaintiff's costs in bringing the suit. Because of this fact the only *pro bono publico* actions in which this rationale could be utilized to shift fees would be those in which the public, in the form of some governmental body or public instrumentality, had been named as a party defendant. Undoubtedly a large proportion of *pro bono* suits would satisfy this requirement, but there seems to be no valid reason for restricting the private attorney general doctrine to only these actions. Moreover, the ideal of the unjust enrichment principle—charging each beneficiary a share of the litigation expenses proportionate to his gain—rarely will be achieved in the private attorney general context to the degree which it is in traditional common fund cases. That is, it is highly unlikely that the benefits devolving from any particular *pro-bono* action will be apportioned among the beneficiaries according to their relative contributions to the public body involved in the suit.⁹⁷ Thus it would seem that the unjust enrichment consideration should, at most, serve as a supplementary factor in determining whether the private attorney general should be awarded fees.

The conclusion suggested by the above considerations is that the courts should address themselves straightforwardly to the substantive public benefits which a plaintiff's litigative efforts allegedly have provided. The award of attorneys' fees should not turn automatically upon the invocation of certain federal statutes or upon the presence of

96. For a discussion of the common fund doctrine see text accompanying notes 9-11 *supra*.

97. The *La Raza* case is a good example of this proposition. There, as indicated previously, the court delineated the stratified benefits of the action as follows: the "most immediate impact" being on "those 5000 people about to be uprooted from their homes and deprived of the parks," lesser but "substantial benefits" accruing to the 200,000 residents of Hayward, Union City and Fremont from the increased protection to their parks, the "very real impact" upon all citizens of the Bay Area in being protected from undue housing and environmental problems in connection with the highway project in question, and finally the benefit to all Californians of the increased likelihood of state agency compliance with federal statutes and regulations. *La Raza Unida v. Volpe*, Civ. No. C-71-1166 RFP at 8 (N.D. Cal. Oct. 19, 1972). Clearly there is no feasible way in which the costs of such an action could be transferred to the beneficiaries in proportion to their relative gains.

a public agency as a party defendant, but rather should depend in all cases upon the actual societal benefits which may be said to have resulted from the plaintiff's suit. This approach obviously would not preclude giving appropriate weight to policies which are in fact qualitatively favored by society. Nonetheless it would obviate the spurious shibboleth of purporting to find a strong congressional policy in any particular statute.

The adoption of such a benefit analysis approach to *pro bono* fee shifting would, in addition to avoiding the pitfalls and limitations of the rationales discussed above, seem to provide other advantages as well. For example, much of the conceptual confusion and waste of judicial energy which has persisted to date would be eliminated by placing the doctrine upon a simple and common sense footing. Also, it would open the way for adoption of the private attorney general doctrine by the state court systems.⁹⁸ That is, much of the public interest litigation which occurs in the state courts necessarily is based upon common law principles and, hence, in these cases no ready analogy to the strong congressional policy test would be present. "General public benefit," on the other hand, is a concept which works equally well in both state and federal courts.

The second area of disharmony among the courts is that dealing with the requirement of a need to encourage private enforcement. This requirement is, of course, based upon the proposition that if no such need exists in any particular case, then there is also no justification for awarding attorney's fees under the private attorney general doctrine. The problem presented is one of identifying those circumstances which effectively obviate the need to encourage private litigation. In this regard the courts have discussed two basic factors: the adequacy of public enforcement and the likelihood that the suit would have been brought regardless of the potential for a fee award. As to the adequacy of public enforcement, the cases discussed above run the gamut from *Brewer*—which declined to apply the private attorney general doctrine on the ground that both the Department of Justice and the Department of Health, Education and Welfare were fully empowered to enforce the specific statute in question⁹⁹ (even though neither had in fact intervened)—where fees were awarded despite the fact that the United States was actually a plaintiff in a suit consolidated with the action brought by the NAACP.

98. Although any discussion of state law is beyond the scope of this article it may be noted that at least one California trial court recently has awarded attorneys' fees expressly upon the private attorney general rationale. See *Mandel v. Hodges*, No. 427816 (Alameda Super. Ct., Feb. 14, 1973).

99. 456 F.2d at 950 n.22.

Viewing the question in a practical light it would seem that the mere fact that various public agencies are empowered to enforce a particular law should not significantly influence the decision of whether to award fees. The *empowerment* of a federal agency to bring suit does not overcome the agency's inherent restraints, noted in *La Raza*, of limited funding¹⁰⁰ and, in some instances, conflicts of interest.¹⁰¹

The practical significance of these factors is reflected in several of the closely analogous "standing" cases which recently have expanded that concept in the context of suits and hearings affecting public interests. In *Office of Communication of United Church of Christ v. FCC*,¹⁰² for example, where plaintiffs were found to have standing to intervene in an FCC television license renewal hearing, the court noted that the duties and jurisdiction of the FCC were vast and that the commission itself had acknowledged its inability to oversee completely the performance of every one of its thousands of licensees. In view of this fact the court then observed:

The theory that the Commission can always effectively represent the listener interests without the aid and participation of legitimate listener representatives fulfilling the role of private attorneys general is one of those assumptions we collectively try to work with so long as they are reasonably adequate. When it becomes clear, as it does to us now, that it is no longer a valid assumption which stands up under the realities of actual experience, neither we nor the Commission can continue to rely upon it.¹⁰³

Seemingly, the only truly substantive consideration in regard to the potential of public enforcement is that of avoiding duplicated effort. It is patently unfair to a defendant to, in effect, make him pay twice for a wasteful overlap of efforts by the government and private plaintiffs. To avoid this possibility, however, by refusing fees in every case where the attorney general *might* have brought suit would be a solution more severe than the problem. A far better approach would seem to lie in employing some judicial means of efficiently coordinating the plain-

100. For a clear congressional acknowledgement of the limited funding problem in the context of school desegregation enforcement see the quotation included in note 121 *infra*.

101. The most extreme example of a conflict of interest—where the public agency charged with enforcing the particular law is named as a party defendant—ipso facto requires that the suit be maintained by private interests. This situation has existed and been judicially recognized in at least two of the recent private attorney general cases. *La Raza Unida v. Volpe*, Civ. No. C-71-1166 RFP at 10 (N.D. Cal. Oct. 19, 1972) and *Ross v. Goshi*, 351 F. Supp. 949 (D. Haw. 1972).

102. 359 F.2d 994 (D.C. Cir. 1966).

103. *Id.* at 1003-04. This acknowledgement of the practical limitations on public law enforcement agencies would seem to reinforce the similar sentiments expressed by Judge Winter's concurrence in *Brewer*. Compare the quotation accompanying note 60 *supra*.

tiffs' efforts. This might be done, for example, by staying the private attorney general's suit until the completion of the action brought by the actual attorney general or other public enforcement entity or, alternatively, by consolidating the respective suits.¹⁰⁴ Also, as a further safeguard, the defendant might be allowed to show that a needless duplication of effort had in fact occurred and that the private attorney general's award should be reduced accordingly.¹⁰⁵ Either of these approaches seems preferable to an outright denial of fees on the highly speculative pretext that the action eventually *would have* been brought by the United States Attorney General.

Turning finally to the question of financial hardship on the plaintiff, the following points are worthy of note. First, the fact that a particular plaintiff is wealthy enough to absorb the cost of a public interest law suit without serious detriment to his financial security should not influence a court's decision of whether to award fees. Since the purpose of the private attorney general doctrine is to encourage public interest litigation, and since the cost of such suits generally outweighs the resulting benefit to any single individual,¹⁰⁶ there would appear to be no logical basis for excluding the wealthy from the ranks of the would-be private attorneys general.¹⁰⁷

104. Consolidation in the federal courts is governed by Rule 42 of the Federal Rules of Civil Procedure which provides in relevant part: "When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all matters in issue in the actions; it may order all actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

105. *Cf., e.g.,* *Lea v. Cone Mills Corp.*, 467 F.2d 277 (4th Cir. 1972); *Henelopen Hotel Corp. v. Aetna Ins. Co.*, 251 F. Supp. 189 (D. Del. 1966).

106. As pointed out by Judge Peckham in *La Raza*: "Absent foundation funding, it is simply not economically rational for any single individual or small group of individuals, to attempt to capture their minute portion of aggregate good by incurring large expense to enforce a widely held right." *La Raza Unida v. Volpe*, Civ. No. C-71-1166 RFP at 14-15, 1972 N.D. Cal. Oct. 19, 1972).

107. Where the plaintiff uses the gratis legal services of public interest or legal aid attorneys who receive their operating expenses from either private or public sources or both, two interrelated policy questions are raised: first, does the encouragement-of-litigation rationale continue to have sufficient validity to justify the awarding of attorneys' fees and, second, does it make any difference whether the legal organization receives its funding from public, as opposed to private, sources. These questions have not as yet received adequate attention from the courts. Three recent cases, however, do provide some insight into the initial, and apparently conflicting, responses which have so far been made. In *Miller v. Amusement Enterprises, Inc.*, 426 F.2d 534 (5th Cir. 1970), the court awarded fees to plaintiff's attorneys in spite of the fact that they had never intended to charge plaintiffs for their services. The court stated that "[w]hat is required is not an obligation to pay attorney fees. Rather what—and all—that is required is the existence of an attorney-client relationship, a status which is wholly independent of the source of the fee. As witness the effective service of counsel in the defense of criminal defendants, the availability of post-conviction habeas remedies and now wide-

On the other hand, a valid consideration would be whether a sufficient private interest is promoted concurrently with the public interest such that a court might conclude that the suit would have been brought regardless of any alleged public-mindedness on the part of the plaintiff. If such is the case, the additional incentive of transferred fees is not necessary.

The Doctrine Is Placed in Issue: The Reversal of *Bradley v. School Board*¹⁰⁸

On November 29, 1972 *Bradley v. School Board* was reversed by a two to one decision of the United States Court of Appeals for the Fourth Circuit.¹⁰⁹ This decision, the first to directly reject the private attorney general doctrine as a proper basis for shifting attorneys' fees, gives rise to a direct conflict among the federal courts,¹¹⁰ and, accordingly, would seem to presage ultimate intervention by the Supreme Court. Because of its unquestionable significance, and because it runs contrary to the fee shifting rationale advocated in the preceding section, the *Bradley* reversal clearly merits careful examination.

The majority opinion in *Bradley* is divided into three sections. The first deals with the district court's reliance on the unreasonable and obdurate conduct rule, the second is directed toward the private

spread organized services on behalf of the poor." *Id.* at 538-39. The full significance of this holding is somewhat in doubt, however, since the court failed to indicate whether the attorneys involved were publicly or privately financed. The broad language and reasoning used by the court, though, would seem to be applicable in either case. In *La Raza Unida v. Volpe*, Civ. No. C-71-1166 RFP (N.D. Cal. Oct. 19, 1972), an award of fees was made to a privately financed public interest law firm. Judge Peckham observed that: "The fact that attorneys in this action . . . require no fees from their clients or that they receive tax-exempt foundation money is not germane to their status as private attorneys-general. . . . We cannot presume Congress intended to rely on tax-exempt foundations to fund costs of litigation in order to effectuate its policies, nor that such funding will continue in the future." *Id.* at 13 n.6. Finally, in *Ross v. Goshi*, 351 F. Supp. 949 (D. Haw. 1972), Judge King refused to grant fees to the plaintiff's attorneys, the Hawaii Legal Services Project, on the ground that they were a government-financed nonprofit organization and as such required no additional funding. "Legal Services' attorneys can function as private attorneys-general irrespective of whether this court awards them counsel fees. Indeed, this is one of the reasons underlying the establishment and funding of Legal Services Projects throughout the nation. There is thus no 'necessity' for an award of fees within the text laid down by *La Raza Unida v. Volpe*. . . ." *Id.* at 956.

108. The district court's opinion in *Bradley* is discussed at the text accompanying notes 36-45 *supra*.

109. *Bradley v. School Bd.*, 472 F.2d 318 (4th Cir. 1972).

110. For a list of the major cases and jurisdictions in which the private attorney general doctrine has been adopted see note 1 *supra*.

attorney general doctrine and the third construes the applicability of the fee shifting provision of the recently enacted Emergency School Aid Act.¹¹¹

In addressing itself first to the question of whether the school board's litigative behavior might be characterized as being so unreasonable and vexatious as to justify an award of attorneys' fees, the court reviewed the entire protracted course of the plaintiffs' suit and concluded that the board's conduct had not, in fact, been sufficiently culpable.¹¹²

Bad Faith revisited

The court next turned to the private attorney general doctrine which had served as an "alternative ground" for the fees award in the district court. In beginning its analysis, the court first suggested that the lower court had apparently conditioned the doctrine's application upon a finding that "the rights of the plaintiff were plain and the defense manifestly without merit."¹¹³ In other words, the court attributed to the district court a formulation of the private attorney general doctrine which, in effect, incorporated the substance of the unreasonable conduct rule.¹¹⁴ On this construction the court simply referred to its reasoning in the first section of its opinion and held that if this were indeed the basis of the district court's holding, it did not support an award of fees.

111. Pub. L. No. 92-318, 86 Stat. 235. The attorneys' fees provision of this act, section 718, is quoted in note 122 *infra*.

112. The court summarized its findings as follows: "It is clear that the Board, in attempting to develop a unitary school system for Richmond during 1970, was not operating in an area where the practical methods to be used were plainly illuminated or where prior decisions had not left a 'lingering doubt' as to the proper procedure to be followed. Even the District Court had its uncertainties. All parties were awaiting the decision of the Supreme Court in *Swann* [v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971)]. Before *Swann* was decided, however, the parties were engaged in an attempt to develop a novel method of desegregating the Richmond school system for which there was not at the time legal precedent. Nor can it be said that there was not some remaining confusion, at least at the District level, about the scope of *Swann* itself. The frustrations of the District Court in its commendable attempt to arrive at a school plan that would protect the constitutional rights of the plaintiffs and others in their class, are understandable, but, to some extent, the School Board itself was also frustrated. It seems to us unfair to find under these circumstances that it was unreasonably obdurate." *Bradley v. School Bd.*, 472 F.2d 318, 327 (4th Cir. 1972).

113. *Id.*

114. The court expressly admits this fact: "If this is the basis for the [lower] Court's alternative ground, it really does not differ from the rule that has heretofore been followed consistently by this Court that, where a defendant defends in bad faith or in defiance of law, equity will award attorney's fees." *Id.* at 328.

The court's error in considering such a formulation of the doctrine is manifest. In the first place, such a rule would be entirely superfluous; once a finding of bad faith had been made there would be no need to consider further questions of public policy since an award of fees would already be justified under the unreasonable and vexatious conduct rule. Moreover, the district court's opinion quite clearly precludes any such interpretation of its "alternative ground."

The private lawyer in [school desegregation suits] most accurately may be described as a "private attorney general." *Whatever the conduct of defendants may have been*, it is intolerably anomalous that [such] counsel . . . should be compelled to look to himself or to private individuals for the resources needed to make his proof.¹¹⁵

Attack on the Private Attorney General Doctrine

Conceding that its initial interpretation might not accurately represent the district court's holding, the court next considered the private attorney general doctrine in a more realistic light, i.e., with no additional bad faith requirement. After reviewing various arguments and cases the court concluded that "if [fee] awards are to be made to promote the public policy expressed in legislative action, they should be authorized by Congress and not by the courts."¹¹⁶ The court proffered three basic arguments in support of its ruling: (1) there was evidence that Congress did not intend attorneys' fees to be awarded in school desegregation cases, (2) the *Mills* and *Lee* decisions were inapposite to the present proceeding and (3) in any event, the private attorney general rule was not an appropriate judicial doctrine since it encroached upon the legislative sphere of governmental activity.¹¹⁷

A Finding of Implied Legislative Intent

As to the purported finding of an implicit intention on the part of Congress to deny the recovery of attorneys' fees in school desegregation cases the court made two specific offerings of evidence. The court first pointed out that legislation which would have authorized such fee shifting was introduced in Congress in 1971, as part of a bill designed to assist in the integration of schools, but was not favorably acted upon. In addition, the court pointed to the Civil Rights Act of 1964¹¹⁸ and indicated that "it expressly provided for such [a fee] award in both the equal employment opportunity and the public ac-

115. 53 F.R.D. at 42 [emphasis added].

116. *Bradley v. School Bd.*, 472 F.2d 318, 330-31 (4th Cir. 1972).

117. *Id.* at 328-29.

118. The relevant provisions of this act are included in 42 U.S.C. §§ 2000a-2000 (h) (1970).

commodation sections but pointedly omitted to include such a provision in the public education section."¹¹⁹

Although these arguments appear somewhat persuasive on their face,¹²⁰ closer analysis reveals their utter lack of probative force. The legislation which was introduced in Congress in 1971 apparently was never acted upon in a manner which might justify an inference that Congress had any serious reservations concerning the advisability of allowing fees to prevailing plaintiffs in school integration actions.¹²¹ In fact, this very bill, along with its attorneys' fees provision, ultimately was carried into the 1972 session of Congress and *enacted* Title VII, "Emergency School Aid Act," of the Education amendments of 1972.¹²² Secondly, with respect to the omission of a fees provision

119. *Bradley v. School Bd.*, 472 F.2d 318, 328 (4th Cir. 1972).

120. In light of *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967), it can hardly be doubted that legislative action which implicitly manifests a clear intent to restrict the availability of attorneys' fees awards will be recognized as such and given effect by the courts. The crucial inquiry which arises in this regard is whether the legislative action in question actually indicates a clear and unambiguous intent to restrict the court's fee shifting powers.

121. This opinion was expressed by Mr. Richard Smith, associate counsel to the Senate Subcommittee on Education, Committee on Labor and Public Welfare, in a phone conversation with the author on February 3, 1973.

As to the underlying rationale of the attorneys' fees provision itself, the following explanation was offered in a Senate Committee on Labor and Public Welfare report:

"[School desegregation] laws are not now being enforced throughout the nation. The Federal government is devoting neither the time, effort nor the financial resources necessary for adequate law enforcement. For example, the budget of the Justice Department's Civil Rights Division for education activities amounts to only \$1 million a year. Only six school desegregation suits have been brought in Northern and Western states by the Justice Department. Only nine school districts in Northern and Western states have been required to file desegregation plans under Title VI of the Civil Rights Act of 1964. The Committee believes that funds should be made available to assure that Federal laws will be enforced throughout the country, while at the same time, under the policies and programs set forth in this bill, voluntary efforts to achieve quality education in stable integrated environments are assisted throughout the nation.

"Although litigation directed toward the enforcement of these laws is often time consuming and therefore expensive, litigation on behalf of those injured by breach of legal requirements remains the most effective and economical method of which the Committee is aware to obtain protection of legal rights." S. REP. NO. 92-61, 92d Cong., 1st Sess. 25 (1971).

122. Pub. L. No. 92-318, 86 Stat. 235. Section 718 of this act, relating to attorney fees, provides as follows: "Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof), or the United States (or agency thereof), for failure to comply with any provision of this title or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring

in the public education section of the 1964 Civil Rights Act,¹²³ the simple explanation appears to be that this section does not contemplate private actions but merely enables the United States attorney general to bring desegregation actions on behalf of persons he feels are unable to initiate their own suits.¹²⁴ Accordingly, there is no reason for this section to provide for awarding attorney's fees to private plaintiffs.¹²⁵

An Attempt to Distinguish Mills and Lee

The court's next argument was that neither *Mills v. Electric Auto-Lite Co.*¹²⁶ nor *Lee v. Southern Home Sites Corp.*¹²⁷ was authority for awarding fees in the fact situation presented in *Bradley*. Any reliance on *Mills*, the court said, was misplaced " 'because conferral of benefits, not policy enforcement, was the *Mills* Court's stated justification for its holding.' . . . In fact, the award in *Mills* was based on the same concept of benefit as was used to support the award in *Trustees v. Greenough*. . . ."¹²⁸

These assertions do not appear to be well-founded. First, the decision in *Mills* was precisely that the federal courts, in their application of the common fund doctrine, were justified in departing from the *Greenough* requirement of a pecuniary benefit so as to require only that the benefit conferred be of a substantial nature.¹²⁹ Second, the distinction which the *Bradley* court draws between "conferral of benefits" and "policy enforcement" in *Mills* is largely illusory since the principal benefit conferred in that case was, in fact, the enforcement of public policy.¹³⁰ It would appear, then, that the only conceptual feature of *Mills* which prevents it from being direct authority for an award of fees in *Bradley* is the fact that, at least formally, *Mills* spoke in terms

about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

This provision had been modified from the form in which it was originally introduced which would have assessed plaintiffs' fees against the federal government rather than the defendant.

123. 42 U.S.C. § 2000c (1970).

124. Private desegregation actions apparently are almost always brought under 42 U.S.C. § 1983 (1970).

125. The public accommodations and equal employment opportunity sections, 42 U.S.C. §§ 2000a and 2000e respectively, on the other hand, expressly provide for private actions. 42 U.S.C. §§ 2000a-3(a) and 2000e-5(e) (1970).

126. 396 U.S. 375 (1970). See text accompanying notes 28-35 *supra*.

127. 444 F.2d 143 (5th Cir. 1971). See text accompanying notes 45-52 *supra*.

128. *Bradley v. School Bd.*, 472 F.2d 318, 329 (4th Cir. 1972), quoting Note, 50 TEXAS L. REV. 204, 207 (1971).

129. See text accompanying notes 27-33 *supra*.

130. See text accompanying note 34 *supra*.

of the fund theory and its appurtenant unjust enrichment rationale.¹³¹ This obstacle, however, seemingly was overcome by the Fourth Circuit itself in *Brewer v. School Board*.¹³² That is, if one were to combine the quasi-fund theory of *Brewer*¹³³ with the substantial benefit test of *Mills*, there seemingly would exist a legal apparatus which would wholly justify an award of fees in *Bradley*.¹³⁴ Nonetheless, the court failed to utilize this unique potential provided by its earlier decision.

The *Bradley* court's dismissal of *Lee* is equally unconvincing. In essence the court's argument was that the *Lee* court had justified its award of fees by noting that there existed a federal statute which authorized fee awards in suits closely parallel to the action before it, and that by analogy, fees should also be allowed in that action.¹³⁵ In contrast to the *Lee* situation, the *Bradley* court implied that there was no statute allowing attorneys' fees to be shifted in school desegregation actions to which the court could analogize the action before it.

The deficiency of this summary dismissal of *Lee* is that it fails to treat the true breadth of the *Lee* rationale. The statutory analogy argument was but one pillar of the *Lee* holding. The *Lee* court also relied upon *Mills*, construing it in exactly the sense which the *Bradley* court refused to, and upon *Piggie Park*.¹³⁶ These portions of *Lee*, which did, in fact, provide direct authority for an award of fees in *Bradley*, were entirely ignored by the court.

Congressional Silence and Separation of Power

The final arguments in *Bradley* were aimed directly at the roots of the private attorney general doctrine:

If, however, the rationale of *Mills* is to be stretched so as to provide a vehicle for establishing judicial power justifying the em-

131. The substance of even this distinction is questionable, however, since *Mills* is readily susceptible of a pure policy enforcement interpretation in spite of its formal adherence to the fund doctrine. See note 35 and accompanying text *supra*.

132. 456 F.2d 943 (4th Cir. 1972). This case is discussed in the text accompanying notes 53-61 *supra*.

133. See text accompanying note 59 *supra*.

134. The argument would run simply that instead of providing plaintiffs' class with the benefit of free transportation, as was the case in *Brewer*, the plaintiffs in *Bradley* had conferred upon their class the "substantial benefit" of accelerated desegregation, or, in other words, the enforcement of the policies inherent in the equal protection clause and 42 U.S.C. § 1983, and hence, under the quasi-fund theory they were entitled to receive attorneys' fees from the school board.

135. For a discussion of this portion of the *Lee* opinion see notes 49-51 and accompanying text *supra*.

136. These aspects of *Lee* are discussed in the text accompanying notes 47, 48 and 52 *supra*.

ployment of award of attorney's fees to promote and encourage private litigation in support of public policy as expressed by Congress or embodied in the Constitution, it will launch courts upon the difficult and complex task of determining what is public policy, an issue normally reserved for legislative determination, and, even more difficult, which public policy warrants the encouragement of award of fees to attorneys for private litigants who voluntarily take upon themselves the character of private attorneys-general.¹³⁷

In addition, the court contended that "[c]ourts should not assume that Congress legislates in ignorance of existing law . . ."¹³⁸ Rather, they should interpret Congress's failure to provide for fee awards under any particular statute as constituting a purposeful expression of legislative intent that such awards "should be allowed only as they may be authorized under the traditional and long established principles. . ."¹³⁹

These pronouncements by the *Bradley* majority would seem to raise two fundamental questions: (1) Should federal courts regard legislative silence as a constraint against implementing any new fee shifting rationales, and (2) if not, should the courts still refrain from implementing the private attorney general rationale on the ground that it entails policy determinations which are more properly left to Congress? It is urged that each of these questions should be answered in the negative.

Inferring a legislative mandate based on Congress's failure to express itself would seem to entail a wholly unwarranted abdication of power which has long been recognized as properly residing within the federal judiciary. None of the leading cases which have discussed the inherent jurisdiction of the federal courts to award fees has ever suggested that this power is arbitrarily circumscribed, or that having once been an organic and flexible source of judicial authority it is now a mere collection of a few petrified rules. Indeed, as discussed earlier in this note, federal courts had undertaken considerable departures from the traditional fee-shifting exceptions even prior to the private attorney general doctrine.¹⁴⁰ Thus, it would seem that the reasoning

137. *Bradley v. School Bd.*, 472 F.2d 318, 329 (4th Cir. 1972).

138. *Id.* at 330.

139. *Id.*

140. See text accompanying notes 12-34 *supra*. Another case which clearly demonstrates the courts' willingness to depart from traditional fee-shifting exceptions when considerations of equity warrant it, and which, interestingly enough was decided by the Fourth Circuit, is *Rolax v. Atlantic Coast Line R.R.*, 186 F.2d 473 (4th Cir. 1951). There, black employees of defendant railroad company brought suit against the railroad and the Brotherhood of Locomotive Firemen and Engineers, a labor union, for negotiating a contract which allegedly prejudiced the continued employment of black firemen. The contract was in fact found to be racially discriminatory and hence void. In decreeing the relief to which plaintiffs were entitled the court upheld the lower court's

of the *Bradley* court could be applied just as persuasively to reach a directly opposite conclusion. That is, assuming that Congress does indeed act with full awareness of existing legal precedent, it arguably follows that legislative silence indicates, if anything, an intent to give full reign to the demonstrated expansiveness of the court's fee shifting powers.

The remaining question, then, is whether the courts should, as a matter of judicial discretion, refrain from implementing the private attorney general doctrine. The *Bradley* court suggests that they should on the ground that the doctrine allegedly requires the courts to make two types of policy determinations which are better left to Congress: namely, which laws effectuate public policy per se and which of such laws warrant the enforcement incentive of a fees award. This argument, however, would not appear to be particularly persuasive. To begin with, it is difficult to see how encouraging the enforcement of laws which by definition reflect public policy "as expressed by Congress or embodied in the Constitution" entails an independent determination by the courts as to the existence of such policies. Indeed, the simple fact remains that since all federal laws embody public policy, the vindication of *any* such law operates, to some greater or lesser extent, to advance the public interest.¹⁴¹ Hence, no judicial inquiry into the existence of public policy per se would seem to be involved in the determination of whether to award fees under the private attorney general doctrine.

It is true, of course, that the doctrine does require the courts to weigh and balance the conflicting policies which inhere in its applica-

award of attorneys' fees. The court stated that: "Ordinarily, of course, attorneys' fees, except as fixed by statute, should not be taxed as part of the costs recovered by the prevailing party; but in a suit in equity where the taxation of such costs is essential to the doing of justice, they may be allowed in exceptional cases. The justification here is that plaintiffs of small means have been subjected to discriminatory and oppressive conduct by a powerful labor organization which was required, as bargaining agent, to protect their interests. The vindication of their rights necessarily involves greater expense in the employment of counsel to institute and carry on extended and important litigation than the amount involved to the individual plaintiffs would justify their paying. In such situation, we think that the allowance of counsel fees in a reasonable amount as a part of the recoverable costs of the case is a matter resting in the sound discretion of the trial judge. *Id.* at 481. It is apparent that this rationale comes within none of the traditional exceptions to the general rule, but rather is concerned only with basic principles of equity.

141. Cf. Note, *The Allocation of Attorney's Fees After Mills v. Electric Auto Lite Co.*, 38 U. CHI. L. REV. 316, 334 (1971). Such benefit to the public at large may, of course, be found in any of several forms: for example, in the deterrence of similar violations of the law, in the clarification of vague and ambiguous legal rights and duties, or in the substantive therapeutics resulting from the individual suit.

tion, that is, the relative benefit accruing to the public from a particular type of law suit, on the one hand, and the general policy against fee shifting, on the other. This task, however, seems far more suited to the judicial branch of government than to the legislature. That is, congressional power is necessarily limited to providing for fees in broad generic terms. Therefore, any legislative action aimed at using attorneys' fees to promote *pro bono publico* litigation would be confined to either providing for mandatory fee awards under specific statutes, which, in effect, would predetermine that *all* suits brought pursuant to that statute were worthy of special enforcement, or requiring the courts to determine, in their discretion, which action merited fee awards.

The former alternative is of limited utility since statutes rarely are drafted in a way which guarantees that all suits brought under their auspices will promote the public interest to a certain predetermined degree. Moreover, this alternative would be even less useful in regard to broad, uncoded provisions of the Constitution. The concept of due process, for example, encompasses a range of potential actions far too expansive to be codified in a statute which, in effect, would predetermine that all due process suits were entitled to enhanced enforcement at the expense of the defendant.¹⁴² The second legislative alternative, that of authorizing the courts to shift fees in their discretion does no more than expressly place the burden of determining which suits justify fee awards where in most instances it must ultimately reside, *i.e.*, with the courts. Thus it would appear that neither of the policy determinations which the *Bradley* court characterizes as being "normally reserved for legislative determination" poses a substantial obstacle to the private attorney general doctrine. The first determination—that of which laws promote public policy—is in fact made by the legislature (or, alternatively, is embodied in the Constitution), and the second—that of which suits have sufficiently advanced the public interest to justify the transferring of plaintiff's legal expenses to the defendant—in most instances *must* be made by the courts.

In light of the above discussion, then, it would seem that the Fourth Circuit's repudiation of the private attorney general doctrine in *Bradley* is both an unsupported and unfortunate ruling which hopefully will not be followed.

Conclusion

The emergence of the private attorney general doctrine marks an extremely auspicious development within the federal court system. Firmly established on the traditional chancery powers of the federal

142. Compare the text accompanying notes 94-95 *supra*.

courts and motivated by strong considerations of equity, this doctrine provides the means by which private citizens may surmount the financial obstacle which has long impeded the bringing of actions designed primarily to protect broad public interests. Hopefully, the shadow which has been cast by the Fourth Circuit's opinion in *Bradley* will be eradicated by the Supreme Court. If so, the door will have been opened on a far healthier and more invigorated society.

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THE RECOVERY OF ATTORNEY'S FEES: A NEW METHOD OF FINANCING LEGAL SERVICES

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I. INTRODUCTION

THE Economic Opportunity Act states in its preamble that it is "the policy of the United States to eliminate the paradox of poverty in the midst of plenty in this Nation by opening to everyone the opportunity . . . to live in decency and dignity."¹ Under this Act, a national program to provide legal services for the poor was established as part of the Office of Economic Opportunity (OEO).² The overall objectives of the legal services program were:

First: To make funds available to implement efforts initiated and designed by local communities to provide the advice and advocacy of lawyers for people in poverty.

Second: To accumulate empirical knowledge to find the most effective method to bring the aid of the law and the assistance of lawyers to the economically disadvantaged people of this nation. . . .

Third: To sponsor education and research in the areas of procedural and substantive law which affect the causes and problems of poverty.

Fourth: To acquaint the whole practicing bar with its essential role in combatting poverty and provide the resources to meet the response of lawyers to be involved in the War on Poverty.

Fifth: To finance programs to teach the poor and those who work with the poor to recognize problems which can be resolved best by the law and lawyers.³

The rhetoric was grandiose, but the funding was meager. In 1968 it was conservatively estimated that the cost of providing legal services for the poor⁴ would be \$250,000,000.⁵ In contrast to this figure the bud-

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1. Economic Opportunity Act of 1964 § 2, 42 U.S.C. § 2701 (1970).

2. *Id.* § 222, 42 U.S.C. § 2809(a)(3) (1970). Criminal cases cannot generally be handled by legal services attorneys. *Id.* Legislation was recently passed by the House of Representatives to make legal services an autonomous corporation. H.R. 12350, 92d Cong., 2d Sess. §§ 1001-16 (1972). For discussion of the measure see 118 Cong. Rec. H 1205 (daily ed. Feb. 17, 1972).

3. Guidelines for Legal Services Programs, in 1 CCH Pov. L. Rep. ¶ 6700.10 (1968).

4. The federal poverty line is \$3,000 per year for a family of four. Silver, *The Imminent Failure Of Legal Services For The Poor: Why And How To Limit Caseload*, 46 J. Urban L. 217 (1969). It should be noted that although OEO does not set a dollar standard for eligibility for legal services, it suggests that "[t]he standard should not be so high that it includes

get for legal services in fiscal year 1967 was \$24,600,000,⁶ and in fiscal year 1971, \$70,100,000.⁷ Similarly, although there are more than thirty-three million people falling below the national poverty level,⁸ their needs are being served by only four thousand lawyers,⁹ eighteen hundred of whom are legal services attorneys.¹⁰

Notwithstanding its comparatively small budget and staff, legal services has had a certain measure of success,¹¹ often antagonizing federal, state, and local politicians in the process.¹² Legal services, however, will

clients who can pay the fee of an attorney without jeopardizing their ability to have decent food, clothing and shelter. . . .

The eligibility criteria should include such factors as income, dependents, assets and liabilities, cost of a decent living in the community, and an estimate of the cost of the legal services needed." Guidelines for Legal Services Programs, in 1 CCH Pov. L. Rep. ¶ 6700.35 (1968). In New York City, the indigency standard was \$3,000 per year for individuals, and \$500 for each additional dependent. Order on Motion Approving Application for Incorporation of Community Action for Legal Serv., Inc., In re Judd at 7 (App. Div., 1st Dep't, Oct. 10, 1967). An even more liberal standard of indigency has now been introduced: \$4,000 per year for a single individual, \$4,600 for a family of two, and \$600 more for each additional dependent.

5. It is estimated that 14 million civil legal problems arise each year among the poor. Note, *Litigation Costs: The Hidden Barrier to the Indigent*, 56 Geo. L.J. 516 (1968).

6. Telephone Conversation with Representative of the Office of Economic Opportunity, Washington, D.C., March 23, 1972.

7. 2 Office of Economic Opportunity Digest 8 (No. 5, Jan. 1972).

8. See Silver, *supra* note 4, at 217.

9. *Id.* at 217 & n.6. Assuming that each of the thirty-three million poor had need of a lawyer in a civil matter only once every four years, each poverty lawyer would have to handle approximately 2,000 cases a year, or in excess of seven cases every working day. It has been liberally estimated that an attorney can handle up to 900 cases a year. *Id.* at 227. Any attorney who processes even that many cases, it has been argued, may fail to do an adequate job on each case. *Id.*

While there is a great demand for lawyers in terms of the number of problems poor people have, the very problems themselves are such that attorneys must expend more time and effort to provide the same level of representation as that received by the middle-class. *Id.* at 221. It was estimated in 1969 that so numerous and complex were the legal problems of the poor that even if one were to assume "that lawyers do not die and poor people do not grow in numbers, and that every private attorney in the United States devoted himself exclusively to representing poor people, not until 1973 would it be even theoretically possible to offer adequate legal services to the poor." *Id.* (emphasis deleted). Even with sweeping institutional reforms, presently and for the near future at least, "the need and demand for legal services among the poor will greatly exceed the very limited supply." *Id.* at 221-22.

10. See N.Y. Times, Feb. 2, 1972, at 1, col. 3.

11. See, e.g., Lenzner, *Legal Services Fights for the Poor, But Who Fights for Legal Services?*, *Juris Doctor*, Feb., 1971, at 9-10.

12. See Arnold, *Whither Legal Services*, *Juris Doctor*, Feb., 1971, at 3. For the response of the Director of OEO to a study of the California Rural Legal Assistance Program see 1

become an adequate and effective program only when it receives sufficient funds, when it is cut loose from political interference and, most importantly, when the number of private attorneys interested in the legal representation of the poor is radically increased. A possible solution for these problems has recently come from an unexpected source. Continuing the gradual erosion of the American rule which denies the recovery of counsel fees to a successful litigant in a civil case, the courts have begun to consider the propriety of including as part of recoverable costs¹³ the reasonable attorney's fees of legal services lawyers.¹⁴

The purpose of this article is to analyze the situations in which legal services attorneys may be awarded counsel fees under existing precedents and to advocate the formulation of a new rule which would permit the award of counsel fees in all civil cases and thus enhance the effectiveness of legal representation for the poor in this country. To this end, the article will examine such issues as whether the recovery of reasonable attorney's fees by legal services would alleviate the financial and political pressures on the legal services program and whether the recovery of counsel fees in poverty cases would encourage more private attorneys to handle many of these cases in the future. It will also explore the cases in which legal services attorneys may presently recover attorney's fees, consider whether a rule permitting the recovery of counsel fees in all civil cases is warranted, and analyze the effect such a rule would have on the poor in general and the legal services program in particular.

CCH *Pov. L. Rep.* ¶ 6725 (1971). Additional examples of political interference are documented in Lenzner, *supra* note 11, at 9. Recently Vice President Agnew expressed dissatisfaction with the "whole ball of wax," as he called the legal services program, and stated that closer supervision was necessary. *N.Y. Times*, Feb. 3, 1972, at 1, col. 2. See also *N.Y. Times*, April 20, 1972, at 14, col. 4.

The bill recently passed by the House to turn legal services into an independent corporation provides that no official of the federal government shall exercise any "direction, supervision, or control" over the new corporation and its staff. H.R. 12350, 92d Cong., 2d Sess. § 1013 (1972). President Nixon has recognized that the "program is concerned with social issues and is thus subject to unusually strong political pressures." 1 *U.S. Code Cong. & Ad. News* 744 (1971). The President has expressed support for the idea of a legal services corporation that will be "assured of independence." *Id.* at 745.

That legal services attorneys can be subject to extreme judicial action see *Weintraub v. Adair*, 331 F. Supp. 148 (S.D. Fla. 1971), which enjoined such action by a state court judge.

13. As used in this article, "costs" includes all of those items for which the winning party can compel the losing party to reimburse him. It is not used in any narrow sense of "statutory" costs as distinguished from reimbursable disbursements. See *N.Y. C.P.L.R.* arts. 81-83 (McKinney 1963, Supp. 1971). See also *Carmody-Forkosch New York Practice* 830 n.14 (8th ed. M. Forkosch & A. Wilson 1963).

14. See *Gaddis v. Wyman*, 336 F. Supp. 1225 (S.D.N.Y. 1972) (mem.); *White v. King*, 319 F. Supp. 122, 127 (E.D. La. 1970); *Schlott v. Morton*, 107 N.J. Super. 16, 17, 256 A.2d 641 (1969); *Silberzweig v. Masino*, L & T No. 45384-70 (N.Y. Civ. Ct., Nov. 2, 1970).

II. THE RECOVERY OF COUNSEL FEES TO ALLEVIATE PRESSURES ON THE LEGAL SERVICES PROGRAM

In order to analyze whether the recovery of reasonable attorney's fees would benefit the legal services program, three distinct problems must be considered: (A) the financial pressures on the program; (B) political interference; and (C) the need to involve the private bar in the representation of the poor.

A. *Financial Pressures*

As indicated earlier, the funds provided for legal services are woefully inadequate to fulfill its stated mission.¹⁵ Since there are approximately thirty-three million people eligible for free legal representation, legal services offices are often required to make certain adjustments to remain viable. For example, offices may be closed for part of the day; certain types of cases may not be handled; appeals may not be taken; motion practice may often be non-existent; and test cases will be preferred over individual claims.¹⁶

Additional revenues might remedy many of these shortcomings. The most critical and obvious need is for a larger, more experienced, and better paid legal staff. Not only could a larger staff take on more cases but, more importantly, the cases taken could be handled more effectively. Similarly, additional money would mean more and varied types of supportive services such as social workers, bilingual secretaries, investigators, and duplicating machines. Finally, more attention could be given to community programs designed to educate the poor about legal services and their own legal rights.¹⁷

B. *Political Interference*

The award of counsel fees would not only help augment and diversify the operations of legal services, it would lessen the opportunities for political interference.¹⁸ Of course, the establishment of legal services as a

15. See notes 4-7 *supra* and accompanying text. This article assumes that Congress will maintain legal services funding at present relative levels and not reduce funding by any amounts recovered as counsel fees.

16. For a discussion of these measures see Silver, *supra* note 4, at 227-40; Silverstein, *Eligibility for Free Legal Services in Civil Cases*, 44 J. Urban L. 549 (1967). In this connection, the OEO guidelines for legal services state that "[t]here should not be an arbitrary limit to the scope or type of civil legal services provided to eligible clients. All areas of the civil law should be included and a full spectrum of legal work should be provided: advice, representation, litigation, and appeal." 1 CCH Pov. L. Rep. ¶ 6700.36, at 7703 (1968). For a description of the frustrations faced by a legal services attorney see McLaughlin, *The Legal Services Merry-Go-Round*, *Juris Doctor*, Feb., 1971, at 14.

17. See text accompanying note 3 *supra*.

18. See note 12 *supra*.

public corporation independent of the executive branch will be the single most important factor in reducing, although by no means ending, political interference.¹⁹ As long as the budget for legal services is appropriated by Congress the program will be accountable to Congress. As alternative sources of revenue are made available to legal services, it will become less dependent on federal funding with its concomitant threat of political interference.

C. *The Private Bar*

Effective representation for the thirty-three million poor of this country will become a reality only when the private bar shoulders a large part of this responsibility. One method of stimulating its interest in representing the poor is to demonstrate that attorney's fees are recoverable in many "poverty" lawsuits. If attorney's fees are recoverable in such actions, these suits become, in effect, contingent fee cases, which have traditionally been handled by the private bar. The recovery of counsel fees would thus become the means by which the interest of the private bar in representing the poor could be stimulated. Since one of the objectives of legal services is to "find the most effective method to bring the aid of the law and the assistance of lawyers to the economically disadvantaged people of this nation,"²⁰ legal services would seem to have an *affirmative obligation* to try to create precedents for the recovery of counsel fees in as many "poverty" cases as possible.

III. CIRCUMSTANCES IN WHICH COUNSEL FEES ARE PRESENTLY RECOVERABLE BY LEGAL SERVICES ATTORNEYS

A. *The American Rule and Its Exceptions*

Traditionally, American courts have refused to award reasonable attorney's fees to a prevailing party in a civil law suit.²¹ The successful party, whether he be plaintiff or defendant, is thus never fully compensated since he must pay his counsel fees out of his own pocket.²² Over

19. See note 2 *supra*.

20. 1 CCH Pov. L. Rep. ¶ 6700.10, at 7701 (1968).

21. E.g., *Simmons v. Friday*, 190 F.2d 849, 851 (8th Cir. 1951); *Standard Accident Ins. Co. v. Hull*, 91 F. Supp. 65, 66 (S.D. Cal. 1950); *Martin v. The Amiga Mia*, 80 F. Supp. 42, 50-51 (S.D.N.Y. 1948); *Miss Susan, Inc. v. Enterprise & Century Undergarment Co.*, 270 App. Div. 747, 750, 62 N.Y.S.2d 250, 253 (1st Dep't 1946), *aff'd mem.*, 297 N.Y. 512, 74 N.E.2d 461 (1947); *Grace Harbor Corp. v. Grace Harbor Ass'n*, 130 N.Y.S.2d 592, 595 (Sup. Ct. 1954); see C. McCormick, *Damages* § 60 (1935) [hereinafter cited as McCormick]; cf. *Frommeyer v. L. & R. Constr. Co.*, 261 F.2d 879, 881 (3d Cir. 1958); *Security Ins. Co. v. White*, 236 F.2d 215, 220 (10th Cir. 1956).

22. See Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 Calif. L. Rev. 792 (1966); Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?*, 49 Iowa L. Rev. 75, 85 (1963); Stoeck, *Counsel Fees Included in Costs: A Logical Development*, 38

the years, however, certain well-defined exceptions have been engrafted upon this rule.

1. Statutes

Statutes which award counsel fees to the successful litigant basically fall into two categories. The first category requires the award of attorney's fees to the successful litigant in every case in which he has been injured by a violation of the statute.²³ For example, the Clayton Act provides that "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."²⁴ Provisions such as this represent two separate policy decisions—the award of attorney's fees to successful litigants encourages the enforcement of the particular statute in question and at the same time places the cost of enforcement on those who violate the statute.

The second category of statutes provides that attorney's fees may be granted to the successful litigant in the discretion of the court.²⁵ In exercising this discretion, the court may consider whether the losing party has acted in bad faith.²⁶ Thus the Civil Rights Act of 1964 includes the following section: "In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs."²⁷ Under this category

U. Colo. L. Rev. 202 (1966). A party who must bear the costs of his attorney receives, to that extent, no remedy for his injury. See Note, Attorney's Fees; Where Shall the Ultimate Burden Lie?, 20 Vand. L. Rev. 1216 (1967). One court conceded that statutory costs do not fully compensate a party for his expenses, but stated that "it has been the public policy of this State, from time immemorial, to regard them as adequate." *Manko v. City of Buffalo*, 271 App. Div. 286, 302, 65 N.Y.S.2d 128, 143 (4th Dep't 1946), *aff'd mem.*, 296 N.Y. 905, 72 N.E.2d 623 (1947).

23. See statutes collected in Comment, The Allocation of Attorney's Fees After *Mills v. Electric Auto-Lite Co.*, 38 U. Chi. L. Rev. 316, 318 nn.11 & 12 (1971). See also Consumer Credit Protection Act § 130(a)(2), 15 U.S.C. § 1640(a)(2) (1970).

24. Clayton Act § 4, 15 U.S.C. § 15 (1970).

25. E.g., Agricultural Fair Practices Act of 1967 § 6, 7 U.S.C. §§ 2305(a) & (c) (1970); Plant Variety Protection Act § 125, 7 U.S.C. § 2565 (1970); Securities Act of 1933 § 11(e), 15 U.S.C. § 77k(e) (1970); Trust Indenture Act of 1939 § 323(a), 15 U.S.C. § 77www(a) (1970); Securities Exchange Act of 1934 § 9(e), 15 U.S.C. § 78i(e) (1970); N.Y. Banking Law §§ 6022(8)(g), 6025(5) (McKinney 1971); N.Y. Bus. Corp. Law § 626(e) (McKinney 1963); N.Y. C.P.L.R. § 8303(a)(4)-(5) (McKinney Supp. 1971); N.Y. Ins. Law § 59-a(4) (McKinney 1966).

26. See Comment, The Allocation of Attorney's Fees After *Mills v. Electric Auto-Lite Co.*, 38 U. Chi. L. Rev. 316, 318 (1971).

27. 42 U.S.C. § 2000a-3(b) (1970); see *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968) (*per curiam*). See also 42 U.S.C. § 2000e-5(k) (1970).

of statutes, the recovery of counsel fees not only encourages enforcement and shifts the costs of that enforcement but also punishes the bad faith of the losing party.

2. Private Law Enforcement

Even in the absence of statutory authority, recent federal cases seem to be developing another exception to the traditional rule.²⁸ Attorney's fees should be awarded to the successful litigant in those situations where society wishes to encourage private lawsuits as a method of law enforcement.²⁹ Thus, in *Mills v. Electric Auto-Lite Co.*,³⁰ the Supreme Court while recognizing the general American rule, stated that "both the courts and Congress have developed exceptions to this rule for situations in which overriding considerations indicate the need for such a recovery."³¹ The award of attorney's fees, therefore, was held to provide "an important means of enforcement of the proxy statute."³² Here again, the opportunity to recover legal fees acts as an incentive to private litigation and, more importantly, shifts the cost of law enforcement to the violators themselves. It has thus been suggested that courts should award attorney's fees to successful litigants in environmental actions to encourage such private policing suits.³³ This transfer of the burden of legal fees might make "for a world of viable civil rights, more consumer protection, and less air pollution."³⁴

3. Groundless or Vexatious Suits

Another widely recognized exception to the general rule permits a party to recover attorney's fees when his adversary has engaged in unusual misconduct or harassment, such as instituting a frivolous or

28. E.g., *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Knight v. Auciello*, No. 71-1108 (1st Cir., Jan. 17, 1972); *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971), noted in 40 *Fordham L. Rev.* 714 (1972). See generally *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968) (per curiam).

29. In *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968) (per curiam), the Supreme Court emphasized that when a plaintiff brings an action under the Civil Rights Act of 1964 and obtains an injunction "he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." *Id.* at 402 (footnote omitted). See also *Knight v. Auciello*, 453 F.2d 852 (1st Cir. 1972); *Lee v. Southern Home Sites Corp.*, 444 F.2d 143, 148 (5th Cir. 1971).

30. 396 U.S. 375 (1970).

31. *Id.* at 391-92 (footnote omitted).

32. *Id.* at 396 (footnote omitted).

33. See Comment, *The Allocation of Attorney's Fees After Mills v. Electric Auto-Lite Co.*, 38 *U. Chi. L. Rev.* 316, 329-30 (1971).

34. *Id.* at 329 (footnote omitted).

groundless lawsuit.³⁵ In a number of recent cases involving desegregation, counsel fees were awarded when, in the opinion of the court, the evasion, delay, or obstinate conduct of a party to the litigation justified the awards.³⁶ In these cases the courts seem to have shifted the burden of counsel fees primarily to punish the bad faith of the losing party to the litigation.

4. Prior Litigation

Courts may sometimes award a party attorney's fees incurred in a prior litigation with a third party.³⁷ For example, if *A* becomes involved in a lawsuit with *C* because of *B*'s wrongful conduct, *A* may thereafter sue *B* in a separate action and recover *A*'s attorney's fees expended in the first action. *A*, however, may not recover from *B* the cost of attorney's fees expended in the second suit. If a grantee of land who has been conveyed the land with covenants of title is sued by a person having an adverse interest in the land, the grantee may sue the grantor who has covenanted against the existence of such flaws in the title and recover damages for the defect in title as well as his counsel fees incurred in litigating the question of title in the first suit.³⁸ A variant of this exception would allow *A*, in a separate suit, to recover from *B* attorney's fees expended in defending a prior suit brought maliciously either by *B* or through *B*'s action.³⁹ As in the case of the exception for groundless or vexatious suits, the underlying reason for this exception is again to penalize the wrongdoer for his misconduct.

5. Equitable Fund Doctrine

It has been the rule in the United States for some time that when a party produces, protects, or increases a fund in which others will share,

35. E.g., *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 164, 166 (1939); *Swan Carburetor Co. v. Chrysler Corp.*, 149 F.2d 476, 478 (6th Cir. 1945); *Carter Prods., Inc. v. Colgate-Palmolive Co.*, 214 F. Supp. 383, 414 (D. Md. 1963). Equity will award counsel fees as costs when a case is presented in which "the main ground of the suit is false, unjust, vexatious, wanton, or oppressive . . ." *Guardian Trust Co. v. Kansas City S. Ry.*, 28 F.2d 233, 241 (8th Cir. 1928), rev'd for misapplication of principle, 281 U.S. 1 (1930).

36. E.g., *Hill v. Franklin County Bd. of Educ.*, 390 F.2d 583, 585 (6th Cir. 1968); *Bell v. School Bd.*, 321 F.2d 494, 500 (4th Cir. 1963).

37. E.g., *Safway Rental & Sales Co. v. Albina Engine & Mach. Works, Inc.*, 343 F.2d 129, 133-35 (10th Cir. 1965); *Artvale, Inc. v. Rugby Fabrics Corp.*, 232 F. Supp. 814, 826 (S.D.N.Y. 1964), aff'd, 363 F.2d 1002 (2d Cir. 1966); *Seaboard Sur. Co. v. Permacrete Constr. Corp.*, 130 F. Supp. 184, 187 (E.D. Pa. 1954), aff'd as modified, 221 F.2d 366 (3d Cir. 1955); *Ritter v. Ritter*, 381 Ill. 549, 554-55, 46 N.E.2d 41, 44 (1943); see 5 A. Corbin, *Contracts* § 1037, at 225-26 (1964); *Restatement of Torts* § 914 (1939).

38. *McCormick* § 68.

39. *Id.* § 67.

equity will award the party the cost of his counsel fees out of that fund.⁴⁰ In shareholder derivative actions, for instance, a plaintiff who successfully produces a fund for the benefit of the corporation or the shareholders is entitled to have his legal fees paid out of the fund produced.⁴¹ Recent cases have extended this doctrine to allow the recovery of attorney's fees in cases in which no fund or direct pecuniary benefit was produced.⁴² Attorney's fees may thus be recovered if some form of substantial benefit is produced even though that benefit is of a non-pecuniary nature.⁴³

6. Contracts

The question whether, and to what extent, a party may be obligated to pay the counsel fees of another may be resolved by contract before any dispute arises.⁴⁴ Thus, a landlord may place in a lease a provision

40. *Trustees v. Greenough*, 105 U.S. 527, 532-33 (1881); *Ojeda v. Hackney*, 452 F.2d 947, 948 (5th Cir. 1972) (per curiam); *Doherty v. Bress*, 262 F.2d 20, 22 (D.C. Cir. 1958), cert. denied, 359 U.S. 934 (1959); *Filipowicz v. Rothensies*, 43 F. Supp. 619, 624 (E.D. Pa. 1942); *State Life Ins. Co. v. Board of Educ.*, 401 Ill. 252, 258-59, 81 N.E.2d 877, 880-81 (1948) (per curiam); *Janovsky v. American Motorists Ins. Co.*, 11 N.J. 1, 7, 93 A.2d 1, 4 (1952); *Nance v. Town of Oyster Bay*, 54 Misc. 2d 274, 276, 282 N.Y.S.2d 324, 326 (Sup. Ct. 1967), aff'd mem., 30 App. Div. 2d 918, 293 N.Y.S.2d 704 (2d Dep't 1968); *Southern Ry. v. Peck*, 178 Misc. 638, 640, 34 N.Y.S.2d 370, 372 (Sup. Ct. 1942). In *Triplett v. Cobb*, 331 F. Supp. 652 (N.D. Miss. 1971) (mem.), the court denied recovery of attorney's fees, even though a fund was produced, on the ground that the state officials' conduct did not justify the allowance. *Id.* at 661.

41. See, e.g., *Green v. Transatron Elec. Corp.*, 326 F.2d 492, 496-97 (1st Cir. 1964); *Angoff v. Goldfine*, 270 F.2d 185, 186 (1st Cir. 1959); *Giesecke v. Pittsburgh Hotels, Inc.*, 180 F.2d 65, 66-67 (3d Cir. 1950); *Wolfes v. Paragon Refining Co.*, 74 F.2d 193, 199 (6th Cir. 1934); *Hutchinson Box Bd. & Paper Co. v. Van Horn*, 299 F. 424, 430 (8th Cir. 1924); *McCourt v. Singers-Bigger*, 145 F. 103, 113-14 (8th Cir. 1906); *Perleman v. Feldmann*, 160 F. Supp. 310 (D. Conn. 1958); *Evans v. Diamond Alkali Co.*, 315 Pa. 335, 337-38, 172 A. 678, 679 (1934). See also Hornstein, *Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards*, 69 Harv. L. Rev. 658 (1956); Hornstein, *The Counsel Fee in Stockholder's Derivative Suits*, 39 Colum. L. Rev. 784, 788 (1939).

42. See, e.g., *Kahan v. Rosenstiel*, 424 F.2d 161, 168 (3d Cir.), cert. denied, 398 U.S. 950 (1970); *Schechtman v. Wolfson*, 244 F.2d 537, 540 (2d Cir. 1957); *Globus, Inc. v. Jaroff*, 279 F. Supp. 807, 809 (S.D.N.Y. 1968); *Bosch v. Meeker Coop. Light & Power Ass'n*, 257 Minn. 362, 101 N.W.2d 423 (1960); *W. Fletcher, Private Corporations* § 6045 (perm. ed. rev. repl. 1970). See also *Nelson v. Johnson*, 212 F. Supp. 233, 298-99 (D. Minn.), aff'd, 325 F.2d 646 (8th Cir. 1963) (doctrine applied in suit involving union).

43. *Schechtman v. Wolfson*, 244 F.2d 537, 540 (2d Cir. 1957); *Bosch v. Meeker Coop. Light & Power Ass'n*, 257 Minn. 362, 101 N.W.2d 423 (1960).

44. See, e.g., *Standard Oil Co. v. United States*, 59 F. Supp. 100, 105 (S.D. Cal. 1945), aff'd, 156 F.2d 312 (9th Cir. 1946); *Davis Acoustical Corp. v. Hanover Ins. Co.*, 22 App. Div. 2d 843, 254 N.Y.S.2d 14, 16 (3d Dep't 1964) (mem.); *Singer v. Gerard V. Korda & Co.*, 41 Misc. 2d 785, 786, 246 N.Y.S.2d 427, 429 (Sup. Ct. 1963); *McCormick* § 69.

permitting him to recover attorney's fees incurred as a result of the tenant's failure to perform any covenant in the lease.⁴⁵ Courts, however, may refuse to enforce such contractual provisions when their enforcement would violate public policy.⁴⁶

7. Actions for Divorce or Separation

Counsel fees are generally awarded to the wife in matrimonial actions.⁴⁷ The theory underlying this exception to the general rule is that a husband is duty bound to furnish his wife with necessities and since legal services are necessities the husband must bear this expense.⁴⁸

B. *The Recovery of Counsel Fees by Legal Services*

Before considering how these exceptions would allow legal services attorneys to recover reasonable counsel fees, some objections to permitting recovery by legal services under any circumstances must be answered. First, since those represented by legal services do not pay for legal representation it could be argued that the award of such fees in these cases would be improper. This argument assumes that when attorney's fees are awarded under the exceptions mentioned above, the reason for the award is solely to compensate the successful party. A study of the policy reasons behind the exceptions does not support this assumption. As has been demonstrated, attorney's fees are recoverable more often than not primarily to penalize the misconduct of a party, to encourage the enforcement of certain types of legislation, or to shift the cost of statutory enforcement. Obviously a person who does not pay for an attorney should not recover attorney's fees. When the person is represented by legal services, any award of counsel fees should be paid directly to legal services itself. Indeed, one court has ruled that in the absence of proof that counsel fees will actually reach the legal services lawyer, the award should be denied.⁴⁹

45. See, e.g., *Deary v. Keith* (N.Y. Civ. Ct. 1971), in 166 N.Y.L.J., Oct. 26, 1971, at 20, col. 8; *Seventy-Second St. Properties Inc. v. Woods*, 324 N.Y.S.2d 339 (N.Y. Civ. Ct. 1971); cf. *Edot Realty Co. v. Levinson*, 54 Misc. 2d 673, 283 N.Y.S.2d 232 (N.Y. Civ. Ct. 1967).

46. See *Edot Realty Co. v. Levinson*, 54 Misc. 2d 673, 283 N.Y.S.2d 232 (N.Y. Civ. Ct. 1967); cf. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 Colum. L. Rev. 629 (1943). See also N.Y. Pers. Prop. Law § 402(6-a) (McKinney Supp. 1971).

47. H. Clark, *Domestic Relations* § 14.2, at 428 (1968); McCormick § 64. States may provide a recovery to either spouse under certain conditions. See Stoeck, *supra* note 22, at 208.

48. H. Clark, *supra* note 47, § 14.2, at 428-29. An award of counsel fees, however, will be denied if the wife is suing or defending in bad faith or without probable cause.

49. *White v. King*, 319 F. Supp. 122, 127 (E.D. La. 1970) (plaintiffs sued successfully to overturn a union's dues increase alleged to violate the Labor-Management Reporting and Disclosure Act).

Second, since legal services is a government funded program, some might contend that it should not be permitted to recover attorney's fees.⁵⁰ Legal services was established to provide free legal representation for the poor and obviously may not charge its clients a fee or keep any part of the recovery. Similarly, legal services attorneys are generally forbidden to take fee-generating cases⁵¹ because private attorneys will presumably handle them on a contingent fee basis. The objective of the legal services program is to take those cases in which the anticipated recovery would not attract a private attorney, such as various types of housing matters, administrative agency hearings, or constitutional challenges to legislation or administrative regulations. But assuming that a case falls properly within the guidelines for legal services, there is no OEO policy barring the recovery of legal fees from the losing party to the litigation⁵²

50. This may be the position taken in *Gaddis v. Wyman*, 336 F. Supp. 1225 (S.D.N.Y. 1972) (mem.). In a civil contempt proceeding against New York State welfare officials brought by an OEO funded legal aid office, the court observed that the welfare officials could not deny public assistance to otherwise eligible applicants in anticipation of a new residency requirement passed by the state legislature where the officials had been enjoined from denying public assistance on the ground that the applicant had failed to meet the prior residency requirement. *Id.* at 4. The court added that it was denying attorney's fees to the OEO funded legal aid office which commenced the action because the denial of public assistance by the officials was due to bureaucratic anticipation of new legislation and not to willfull disobedience of the injunction. *Id.* at 5. Similarly, the court held there was no statutory basis for awarding attorney's fees. *Id.* The court did observe, however, that the OEO funded attorneys did not expend any of their own private funds, presumably meaning that attorney's fees cannot be granted when the lawyers expend public rather than private funds on a case. *Id.*

51. Guidelines for Legal Services Programs, in 1 CCH Pov. L. Rep. ¶ 6700.35, at 7703 (1968).

52. The New York court rules of the Appellate Division, First Department, state: "Except as may be specifically provided in the order of the Appellate Division, no corporation, association or organization [which terms include local legal services corporations] shall itself receive or participate in any fee or compensation paid by or on behalf of a client for the rendition of legal services" Rules of Practice of the Appellate Division, First Department, 22 N.Y. Codes, Rules & Regs. § 608.7(f) (1970). This prohibition refers to fees paid by a client or on behalf of a client by someone else. It does not refer to court awarded fees paid by the opposing party in the litigation.

Individual Appellate Division orders approving the creation of local legal services corporations may contain provisions relating to this problem. The order approving the creation of Bronx Legal Services Corporation B states: "neither the Corporation nor any of its employees shall receive or retain any remuneration, lawyers' fees or contingent fees for services" Order on Motion Approving Incorporation of Bronx Legal Serv. Corp. B, *In re Judd* at 7 (App. Div., 1st Dep't, Oct. 10, 1967). This language again seems to refer to fees paid by the client for services rendered. In those instances when attorney's fees are recoverable from the losing party, the recovery is not so much a fee for services rendered by the lawyer as a punishment for the losing party.

In this connection, the National Consumer Act provides that in an action to enforce a consumer's remedy where "the consumer is represented by a non-profit organization [such

—in fact there seem to be strong reasons to encourage the recovery. In those circumstances where the award of attorney's fees is to penalize misconduct, the losing party should not benefit because a legal services attorney represents the successful litigant. Similarly, in those cases where the award of attorney's fees acts to switch the cost of policy enforcement to those who violate the policy, there is no reason to deny the award of counsel fees to legal services. On the contrary, in both situations, not to award attorney's fees to legal services would militate against public policy.

Assuming then that there is no bar to awarding attorney's fees to legal services lawyers, in what circumstances should they be awarded?⁵³

1. Statutes

Although there are many federal and state statutes which permit the court to award counsel fees,⁵⁴ the majority of these statutes would not concern the average legal services attorney. Illustrative federal and New York State statutes that would concern the legal services attorney are set forth below.⁵⁵

as legal services] the organization shall be awarded a service fee, in lieu of attorney's fees, equal to the amount of fees a private attorney would be awarded for the same services." National Consumer Act § 5.307(1) (First Final Draft 1970); see *id.* Comment 1.

53. Although in the ordinary case the recovery of reasonable counsel fees will be sought from a private party, an additional problem may be raised if the recovery of counsel fees is sought in a suit where a governmental agency is a party. Should a governmental agency be penalized for misconduct by having its funds reduced? This complex topic is not treated specifically in this article. In attempting to recover counsel fees from a governmental agency, however, this problem will have to be faced. In *Gaddis v. Wyman*, 336 F. Supp. 1225 (S.D.N.Y. 1972) (mem.), the court avoided this problem in a suit against state welfare officials by denying the recovery of attorney's fees on other grounds.

54. See notes 23 & 25 *supra*.

55. The OEO Guidelines provide that legal services programs "should not provide free legal advice in fee-generating cases, such as . . . cases in which a fee provided by statute or administrative rule is sufficient to retain an attorney." 1 CCH Pov. L. Rep. ¶ 6700.35, at 7703 (1968). Thus in certain of the situations cited in the succeeding text, many cases should properly be referred to private attorneys. Even though a statutory fee is provided, however, private attorneys may still refuse to take a case because of its complexity or for other reasons. In these instances legal services attorneys should handle them and the Guidelines so allow. "If the fee is not sufficient to attract a private lawyer, the client may be eligible for the assistance of the OEO-funded program." *Id.*

As a matter of practice, legal services attorneys in New York City generally refer to private counsel certain landlord and tenant cases where a statutory fee is provided. Provisions of the Administrative Code of the City of New York permit the recovery of reasonable attorney's fees if a tenant is unlawfully removed by a landlord from any rent controlled housing accommodation or if a landlord charges more than the maximum rent permitted under rent control regulations. New York, N.Y. Admin. Code § Y51-11.0(d)(2)-(3) (1971); see N.Y. Real Prop. Law § 234 (McKinney Supp. 1971).

a. *Civil Rights Acts of 1866 and 1964*

In *Lee v. Southern Home Sites Corp.*,⁵⁶ the defendant refused to sell property to plaintiff Lee because he was a Negro. Lee brought a class action against the defendant under a provision of the Civil Rights Act of 1866 which forbids discrimination in the sale of housing and real property.⁵⁷ After enjoining future discrimination and ordering the defendant to sell Lee the property, the district court denied plaintiff's motion for an award of attorney's fees. On appeal the Fifth Circuit, although otherwise affirming the decision, remanded the case to the district court to make findings of fact on the issue of attorney's fees. The court stated that federal courts "have a duty to fashion an effective remedy to carry out the purpose of the statute."⁵⁸ One part of that remedy is the award of counsel fees.

Apart from its use in discrimination cases, one provision of the Civil Rights Act of 1866 has important application in cases involving "sewer service" where default judgments have been based on fraudulent service of process.⁵⁹ In a recent New York case⁶⁰ the court, in denying a motion to dismiss, upheld a counterclaim for damages brought under section 1983⁶¹ against a process server, his employer, and the opposing party, on the theory that sewer service constitutes a deprivation of a right secured by the Constitution. Since courts have previously awarded attorney's fees under this section,⁶² the legal services attorney should request reasonable attorney's fees as part of the damages sought.

56. 444 F.2d 143 (5th Cir. 1971), noted in 40 Fordham L. Rev. 714 (1972).

57. 42 U.S.C. § 1982 (1970). Section 1982 provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." Id. The Supreme Court has held that section 1982 bars private racial discrimination. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), noted in 37 Fordham L. Rev. 277 (1968).

58. 444 F.2d at 144.

59. For illuminating discussions of the prevalency of "sewer service" see Schwartz, *Poverty Law*, 167 N.Y.L.J., Feb. 25, 1972, at 1 col. 1; N.Y. Times Oct. 14, 1969 at 60, col. 1. See also *Central Budget Corp. v. Knox*, 62 Misc. 2d 66, 307 N.Y.S.2d 936 (Civ. Ct. 1969).

60. *Judo, Inc. v. Peet*, 68 Misc. 2d 281, 326 N.Y.S.2d 441 (Civ. Ct. 1971).

61. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983 (1970).

62. E.g., *Dyer v. Love*, 307 F. Supp. 974 (N.D. Miss. 1969). In *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971), the court observed that the award of attorney's fees was part of an effective remedy to carry out the purposes of section 1982. Id. at 144. Similar arguments can be made for section 1983, particularly when the acts complained of are clearly unconscionable as in the case of sewer service.

The Civil Rights Act of 1964 prohibits discrimination in places of public accommodation and discrimination in hiring. In suits brought to enforce these provisions, the Act specifically provides that counsel fees may be awarded to the successful litigant in the discretion of the court.⁶³ Thus, in appropriate cases brought under either of these Civil Rights Acts, legal services attorneys should request counsel fees on the theory that the effective enforcement of these Acts mandates the award of such fees.

b. *Consumer Credit Protection Act*

In connection with any consumer credit transaction, any creditor who fails to disclose to any person any information required under the Consumer Credit Protection Act⁶⁴ (such as the finance charge expressed as an annual percentage rate)⁶⁵ is liable to that person for twice the amount of the finance charge (subject to a minimum of \$100 and a maximum of \$1000) and, in the case of a successful action to enforce these provisions, the costs of the action together with reasonable attorney's fees as determined by the court.⁶⁶ A legal services attorney may find violations of the Consumer Credit Protection Act in various credit transaction situations in which he might be allowed to recover counsel fees from the other side.

c. *Section 234 of the New York Real Property Law*

Section 234 of the New York Real Property Law provides that whenever a lease of residential property shall provide that the landlord may recover attorney's fees incurred as a result of the failure of the tenant to perform any covenant contained in the lease, there shall be implied in the lease a reciprocal covenant by the landlord to pay the tenant's reasonable attorney's fees incurred as a result of the failure of the landlord to perform any covenant in the lease or in the successful defense of any action or summary proceeding commenced by the landlord against the tenant arising out of the lease.⁶⁷ Since clauses allowing the landlord to recover counsel fees are common in many form leases, section 234 may

63. 42 U.S.C. §§ 2000a-3(b) & 2000e-5(k) (1970); The Supreme Court has held that counsel fees should be awarded to one who obtains an injunction under § 2000a-3(b) "unless special circumstances would render such an award unjust." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (per curiam).

64. 15 U.S.C. §§ 1601-81t (1970).

65. *Id.* § 1639(a)(5).

66. *Id.* § 1640(a)(1)-(2). For a holding awarding the recovery of substantial fees under this section see *Ratner v. Chemical Bank, N.Y. Trust Co.*, Civ. No. 69-4195 (S.D.N.Y., Feb. 14, 1972).

67. N.Y. Real Prop. Law § 234 (McKinney Supp. 1971). The statute provides that any waiver of this protection violates public policy. *Id.*

have application in many landlord and tenant cases involving a lease of residential property.

The section may also have application in situations where the lease has expired and a statutory tenancy⁶⁸ has been created under rent control laws. In *Deary v. Keith*⁶⁹ the lease, which contained an obligation by the tenant to pay the landlord's attorney's fees in various situations, had expired in 1961. The tenant continued to live in the premises, thereby creating a statutory tenancy. In 1971 the landlord instituted an unsuccessful summary proceeding to oust the tenant. In ruling that the tenant could recover attorney's fees spent in defending the summary proceeding, the court found: (1) that the lease provision obligating the tenant to pay landlord's fees carried over into the statutory tenancy; (2) that the passage of section 234 of the Real Property Law in 1966 transformed the tenant's obligation to pay the landlord's counsel fees into a mutual obligation; and (3) that while section 234 could not apply to suits brought prior to 1966, it clearly applied to the suit brought by the landlord in 1971.⁷⁰

d. *Section 8303 of the New York Civil Practice Law and Rules*

Section 8303(a)(2) of the New York Civil Practice Law and Rules provides that the court may award "to any party to a difficult or extraordinary case, where a defense has been interposed, a sum not exceeding five percent of the sum recovered or claimed, . . . and not exceeding the sum of three thousand dollars"⁷¹ Although the section does not specifically refer to attorney's fees, it seems that the award of an additional five percent of the sum recovered is in fact such an award. The five percent is only permitted in difficult or extraordinary cases, presumably where legal fees would be disproportionately high. The uses of this section are protean, although it should be noted that the New York courts have not given the section an expansive reading.⁷² In particularly complex cases or in cases where the issues are unusual, legal services attorneys in New York should request the recovery of legal fees.⁷³

68. See *Stern v. Equitable Trust Co.*, 238 N.Y. 267, 144 N.E. 578 (1924). See also 2 J. Rasch, *The New York Law of Landlord and Tenant* § 1067 (1950); 33 N.Y. Jur. Landlord and Tenant § 55 (1964).

69. (N.Y. Civ. Ct. 1971), in 166 N.Y.L.J., Oct. 26, 1971, at 20, col. 8.

70. *Id.* at 20-21.

71. N.Y. C.P.L.R. § 8303(a)(2) (McKinney Supp. 1971).

72. See 8 J. Weinstein, H. Korn & A. Miller, *New York Civil Practice* § 8303.09 (1971).

73. For the factors considered by a court in determining whether a case is "difficult or extraordinary" see *Schwartz v. Bartle*, 51 Misc. 2d 215, 272 N.Y.S.2d 805 (Sup. Ct. 1966). In negligence actions, no matter how difficult or extraordinary, courts will usually not award this additional allowance. See *McGrath v. Irving*, 24 App. Div. 2d 236, 265 N.Y.S.2d

2. The Enforcement of Preferred Policies

Even in the absence of statute, recent cases have demonstrated that attorney's fees may be awarded to encourage the enforcement of certain preferred policies and thus shift the cost of such enforcement to those who violate those policies.⁷⁴ Although there are many instances where this rule may be helpful, mention will be made of only three situations in which preferred public policies would dictate the recovery of counsel fees by legal services. First, a strong case can be made that consumer protection is such a preferred policy.⁷⁵ Second, one could argue that a special proceeding brought by tenants of multiple dwellings in the City of New York for a judgment directing the deposit of rents into court and their use for the purpose of remedying conditions dangerous to life, health, or safety⁷⁶ (a "rent strike") furthers strong public policy—*i.e.*, forcing better housing conditions. Finally, in the rare case where a legal services attorney might become involved in environmental litigation, public policy would clearly mandate a recovery.

3. Groundless or Vexatious Suits

Of all the instances when attorney's fees are traditionally recovered, perhaps the most useful for legal services is the award of counsel fees in groundless or vexatious suits. In *Silberzweig v. Masino*⁷⁷ the landlord brought four non-payment of rent proceedings against the tenant at various times over the course of months. The tenant counterclaimed in the last proceeding for abuse of process and harassment. In addition, the legal services attorneys asked for an award of legal fees. After a

376 (3d Dep't 1965), leave to appeal denied, 17 N.Y.2d 419, 215 N.E.2d 529, 268 N.Y.S.2d 1025 (1966).

74. See cases cited note 28 *supra*.

75. Section 5.202(8) of the Uniform Consumer Credit Code, which has not yet been adopted in New York, provides that in any case in which it is found that a creditor has violated the Code the court may award reasonable attorney's fees incurred by the debtor. In those states in which the Code has been enacted into law, a legal services attorney could obviously recover counsel fees as a statutory right. See Idaho Code §§ 28-31-101 to -39-102 (1971); Ind. Ann. Stat. §§ 19-21-101 to -22-605 (Supp. 1971); Okla. Stat. tit. 14A §§ 1-101 to 9-103 (Supp. 1971); Utah Code Ann. §§ 70B-1-101 to -9-103 (1971); Wyo. Stat. Ann. §§ 40-1-101 to -9-103 (Supp. 1971); see also Consumer Protection Act, Ky. Laws of 1972, Sen. Bill No. 52, approved Feb. 17, 1972, in 1 CCH Pov. L. Rep. ¶ 14,313 (1972). This recent Kentucky statute outlaws false, misleading, or deceptive acts or practices in the conduct of trade or commerce. Consumers may recover attorney's fees in successful private litigation. See also National Consumer Act § 5.307(1) (First Final Draft 1970). *Contra*, *Von Barstel v. Andrew Jergens Co.*, 2 CCH Pov. L. Rep. ¶ 14,038 (Cal. Super., May 14, 1971) (mem.).

76. N.Y. Real Prop. Actions Law §§ 769-82 (McKinney Supp. 1971).

77. L & T No. 45384-70 (N.Y. Civ. Ct., Nov. 2, 1970).

lengthy trial, the court found that by bringing four non-payment of rent proceedings and engaging in other vexatious conduct the landlord had indeed been guilty of abuse of process and harassment and granted the tenant recovery on her counterclaim. More significantly, however, the court awarded the legal services attorneys \$500 in legal fees. Since additional time and effort on the part of the attorneys was required to execute the judgment, the court subsequently granted an additional \$400 in legal fees.

Whenever he wins a case in which bad faith, harassment, or dilatory tactics are employed against him, *e.g.*, requests for numerous adjournments or attempts at surprise on the eve of the trial by motions to amend pleadings to add new claims or defenses,⁷⁸ the legal services attorney should ask the court for an award of fees. In cases where service of process has been fraudulent, resulting in a default judgment, a legal services attorney should request the recovery of attorney's fee based on section 1983 of the Civil Rights Act of 1866.⁷⁹ As an alternative ground of recovery, however, the attorney should argue that fraudulent service of process constitutes abuse of process⁸⁰ and harassment—bases on which reasonable attorney's fees could be granted.

4. Prior Litigation

The rule that attorney's fees incurred in a lawsuit with a third party are recoverable in a second suit from one whose misconduct caused the first lawsuit may be useful in certain consumer actions. For example, *A* is fraudulently induced by *B* to sign a retail installment contract to purchase a defective television set. *B* assigns the contract to *C*, a finance company. *A* refuses to continue his payments upon discovery of the defect. *C* sues *A* to force him to continue making the payments. Since New York law requires *C* to take subject to any defenses *A* may have against *B*,⁸¹ *A* successfully defends the suit brought by *C*. *A*, in a second action against *B*, may recover the cost of his counsel fees incurred in

78. *E.g.*, *Mirabella v. Banco Industrial de la Republica Argentina*, 34 App. Div. 2d 630, 309 N.Y.S.2d 400 (1st Dep't 1970) (mem.). Even without surprise, delay in amending pleadings may trigger the award of counsel fees. See *Ciunci v. Wella Corp.*, 23 App. Div. 2d 754, 258 N.Y.S.2d 994 (1st Dep't 1965) (mem.).

79. See, *e.g.*, *Judo, Inc. v. Peet*, 68 Misc. 2d 281, 326 N.Y.S.2d 441 (Civ. Ct. 1971).

80. *Id.* at 283, 326 N.Y.S.2d at 444. For the elements of the cause of action of abuse of process see *Williams v. Williams*, 23 N.Y.2d 592, 596, 246 N.E.2d 333, 335, 298 N.Y.S.2d 473, 476-77 (1969).

81. N.Y. Pers. Prop. Law § 403(6) (McKinney Supp. 1971); N.Y. U.C.C. 9-318 (McKinney 1964); see *Donnelly*, *Commercial Law*, 1970 Survey of N.Y. Law, 22 Syracuse L. Rev. 167, 179-80 (1971). See also N.Y. Pers. Prop. Law § 302(9) (McKinney Supp. 1971).

the first action but not in this second action. Although the exception seems to require plaintiff to bring a separate suit if he wishes to collect attorney's fees expended in the first action, in some instances there is no reason why attorney's fees could not be recovered if the one whose misconduct precipitated the litigation is impleaded into the first suit. For example, if a health insurance company wrongfully refuses to pay a doctor's bill and the doctor sues the patient, the patient should implead the health insurance company and if he is successful in showing that the health insurance company is liable, the patient should be allowed a pro rata share of his attorney's fees. The recovery must be pro rata because the patient can only recover the amount of attorney's fees attributable to the original suit brought by the doctor and not to the third party suit.

5. Divorce or Separation

As a practical matter, legal services attorneys will rarely be able to recover counsel fees in matrimonial actions since both the husband and wife are usually indigent. In a case where the husband is able to pay and a divorce, contested or uncontested, or separation is granted the wife, attorney's fees should be recovered.

6. Equitable Fund

Finally, there is one situation where the recovery of attorney's fees is permitted to a private attorney, but should not be permitted to a legal services attorney. When a party produces, protects, or increases a fund in which others will share, equity will provide him the cost of his counsel fees out of the fund produced.⁸² For example, if a legal services attorney should successfully bring a class action against a public utility for overcharges, a fund would be created which would be divided among the class of plaintiffs represented in the action. The fund created is in actuality the plaintiffs' recovery; consequently, since legal services cannot charge their clients a fee or take part of the recovery, no attorney's fees should be awarded out of this recovery. In this case the money is not coming from the losing party to the lawsuit but from the client himself.⁸³

82. See note 40 *supra*.

83. There are other instances in which a legal services attorney should be denied an award of counsel fees. Since claims of lawyers for legal services rendered in connection with a workmen's compensation award come out of the award itself, legal services attorneys cannot recover these fees. N.Y. Workmen's Comp. Law § 24 (McKinney 1965). Since legal fees payable to an attorney for the preparation, presentation, and prosecution of claims under laws administered by the Veteran's Administration are deducted from benefits paid the claimant, these fees should not be recoverable by legal services. 38 U.S.C. § 3404(c)(3) (1970).

As can be seen, existing precedents provide legal services attorneys many opportunities to seek reasonable attorney's fees either by motion, by counterclaim, or in a separate action. Generally and unexplainedly, few legal services attorneys make the request.⁸⁴

IV. THE RECOVERY OF ATTORNEY'S FEES IN ALL CASES

Although legal services may presently rely on the above precedents to recover attorney's fees, one may ask whether it would be more advantageous for legal services and the poor whom the program represents if there were a general rule permitting the recovery of counsel fees in all cases. The American rule which generally forbids the award of attorney's fees to a successful litigant has been extensively criticized by commentators.⁸⁵ The thrust of their criticism has generally been the same, *i.e.*, that by not awarding counsel fees, the law does not make the successful litigant whole because he must pay out these expenses himself. In order to evaluate the merits of the American rule, one must briefly consider the rule's historical roots, the justification offered for its continued existence and comparative practice in other countries.

A. History

In England prior to the reign of Edward I, a successful plaintiff in certain actions could recover the expenses of litigation—including attorney's fees.⁸⁶ In 1275, the Statute of Gloucester⁸⁷ permitted the plaintiff in a wide range of cases to recover the costs of his "writ purchased," which included the costs of an attorney.⁸⁸ Similar treatment for defendants was slower in coming but by the provisions of the Statute of Westminster⁸⁹ in 1606, defendants could recover costs whenever they were recoverable by a plaintiff. Suffice it to say that at the time of the Ameri-

84. If legal services attorneys do begin to request counsel fees, they should have some record of the time spent on the case. Legal services should develop internal record-keeping mechanisms similar to those used by law firms. At the very least, each attorney should keep a daily diary of time spent on his cases.

85. Ehrenzweig, *supra* note 22; Greenberger, *The Cost of Justice: An American Problem, An English Solution*, 9 Vill. L. Rev. 400, 413-14 (1964); Kuenzel, *supra* note 22; Stoeck, *supra* note 22; Comment, *Attorneys' Fees as an Element of Damages in Alabama*, 4 Ala. L. Rev. 93, 103 (1951); Comment, *Damages—Attorneys' Fees as an Element in Michigan*, 5 U. Det. L.J. 24, 29 (1941); Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 Vand. L. Rev. 1216, 1230-31 (1967). For foreign criticism of the American rule see, e.g., sources cited in M. Cappelletti & J. Perillo, *Civil Procedure in Italy* § 9.10, at 247-48 n.55 (1965).

86. 2 F. Pollock & F. Maitland, *The History of English Law* 597 (2d ed. 1968).

87. 6 Edw. 1, c. 1 (1275).

88. See Goodhart, *Costs*, 38 Yale L.J. 849, 852 (1929).

89. 4 Jac. 1, c. 3 (1606).

can Revolution, both the common law and equity courts of England awarded attorney's fees to a prevailing party.⁹⁰

The English rule, however, was not originally adopted in the United States;⁹¹ for what reasons, it is not entirely clear. It has been suggested in partial explanation that the colonists were generally suspicious of lawyers and viewed the law as a readily understandable body of rules.⁹² In the nineteenth century, however, some states did permit the award of attorney's fees by statute.⁹³ These statutes, however, expressed the award as a set dollar amount,⁹⁴ not leaving the amount of the award to the discretion of the court or expressing it as a percentage of the recovery. Thus, as the value of money declined, recoveries under these statutes eventually became only nominal.⁹⁵

Three conclusions can be drawn from this brief history. First, although the prohibition against awarding counsel fees was clearly the prevailing rule, it was by no means the universal rule in this country. Second, the historical reasons for the general American rule are either unclear or have little relevance today. The modern legal system is not readily understandable by a layman (if indeed it was in the eighteenth century) and lawyers, while perhaps not totally rehabilitated in the public eye, are no longer viewed with suspicion or hostility. Indeed, the very enactment of legislation in the nineteenth century permitting the award of attorney's fees may indicate that the original reasons for rejecting the British approach had already lost some of their vitality. Finally, the failure of those statutes which did award attorney's fees was caused by faulty drafting and not by any repudiation of the basic concept or propriety of making such awards.

B. *Policy Justifications*

Since the American rule has persisted long after the initial reasons for its adoption, new justifications must have been offered in its support. First, it has been argued that the prevailing party should not recover his counsel fees from his opponent because, unlike other damages, legal fees are too remote from, and not directly caused by, the latter's

90. McCormick § 60.

91. See *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796); McCormick § 60.

92. Goodhart, *supra* note 88, at 873.

93. See, e.g., Act of Jan. 22, 1821, Pub. L. No. 123, § 11 (codified at Mass. Ann. Laws ch. 261, § 23 (1968)); Act of Feb. 22, 1821, Pub. L. No. 50, § 2 (codified at Pa. Stat. Ann. tit. 17, § 1635 (1962)).

94. See *id.*

95. McCormick § 60.

wrongful conduct.⁹⁶ Legal fees are certainly no more remote than court costs which have traditionally been granted in America. It has been suggested that due to today's complex legal system which necessitates the hiring of a lawyer, legal fees may be foreseen as a direct result of a wrong committed.⁹⁷

A second justification for the rule is based on the alleged difficulty in determining a proper fee.⁹⁸ The Supreme Court has pointed out that if the amount of the fee is discretionary a special master might have to be appointed to determine the fee, possibly making the hearing more complex than the basic suit itself.⁹⁹ It must be remembered, however, that there are several significant instances in which courts already make discretionary fee awards.¹⁰⁰ There is nothing to indicate that the courts are now, or have been in the past, unable to determine proper awards, free from delay of excessive controversy.¹⁰¹ In addition, who is better able than the judge who has heard the evidence to evaluate the complexity of the case and the time expended by the lawyer? What the reasonable fee should be will depend primarily on these factors and the prevailing legal charges in the community. Finally, the court's burden of deciding one additional issue is easily counterbalanced by the granting of full compensation to a successful party.

It is also claimed that a change in the American rule might induce attorneys to charge excessive fees.¹⁰² Again, this fear does not seem to be borne out in the situations where counsel fees are presently recoverable. In any event, a change in the rule would only permit the recovery of reasonable attorney's fees. What is reasonable will be decided by a judge or a master (both presumably attorneys) after reviewing the case.

The final justification for not permitting the recovery of counsel fees, *viz.*, that to do so would discourage litigants from bringing uncertain

96. See *St. Peter's Church v. Beach*, 26 Conn. 354, 365 (1857). See also *Stickney v. Goward*, 161 Minn. 457, 201 N.W. 630 (1925).

97. See *McCormick* § 71, at 257.

98. See *Oelrich v. Spain*, 82 U.S. (15 Wall.) 211, 231 (1872); *St. Peter's Church v. Beach*, 26 Conn. 354, 365 (1857); *Frost v. Jordan*, 37 Minn. 544, 36 N.W. 713 (1887).

99. *Oelrich v. Spain*, 82 U.S. (15 Wall.) 211, 231 (1872).

100. See text accompanying notes 23-48 *supra*. See also *Stoebuck*, *supra* note 22, at 207-11.

101. One judge stated that with respect to attorney's fees "it is possible to arrive at a proper charge in almost any case without much difficulty." *In re Osofsky*, 50 F.2d 925, 927 (S.D.N.Y. 1931). The results of this process in the cases where fees are presently allowed "have not aroused serious opposition." *Comment, Distribution of Legal Expense Among Litigants*, 49 *Yale L.J.* 699, 711 (1940).

102. *McCormick, Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 *Minn. L. Rev.* 619, 639 (1931).

claims,¹⁰³ would appear, in fact, to support a change.¹⁰⁴ There are too many cases in American courts today—a good portion of which, it is suggested, are frivolous and unsubstantial.¹⁰⁵ If a change in the general rule would discourage such suits, it would be of considerable benefit to the administration of justice. Of course, it is conceivable that a change in the rule could discourage the initiation of some substantial suits, especially by the poor. The possibility of loss and the added burden of paying his opponent's counsel fees might discourage a poor person from bringing even a meritorious suit.¹⁰⁶ The present rule, however, may have just as inhibitory an effect on the vast majority of potential litigants, including the poor.¹⁰⁷ Under a rule preventing the award of attorney's fees, the successful party is never fully compensated because he must always pay his lawyer's fees, which may exceed or approximate the total recovery in the action. As the cost of legal fees begins to approach the anticipated recovery, the incentive to bring the suits diminishes.

C. *Comparative Practice*

Research has not disclosed one country which follows the American rule. On the contrary, Austria,¹⁰⁸ England,¹⁰⁹ France,¹¹⁰ Hungary,¹¹¹ Italy,¹¹² Sweden,¹¹³ and Switzerland¹¹⁴ award legal fees to the prevailing party, although the manner in which the awards are made varies widely. Professor Ehrenzweig has stated that "this country now is probably alone in failing to allow counsel fees to the victorious litigant."¹¹⁵

From this brief analysis, it appears that the American rule: (1) has questionable historical roots; (2) is unsupportable on policy grounds; and (3) has not been adopted in other legal systems.

103. Ehrenzweig, *supra* note 22, at 797; Kuenzel, *supra* note 22, at 82.

104. Kuenzel, *supra* note 22, at 82-83.

105. See *id.* at 78.

106. Ehrenzweig, *supra* note 22, at 797.

107. *Id.*; Kuenzel, *supra* note 22, at 82-83.

108. Baek, *Imposition of Fees of Attorney of Prevailing Party Upon the Losing Party Under the Laws of Austria*, in 1962 Proceedings of the ABA International and Comparative Law 119 (1963).

109. See Goodhart, *supra* note 88, at 851-54.

110. Freed, *Payment of Court Costs by the Losing Party in France*, in 1962 Proceedings of the ABA International and Comparative Law 126 (1963).

111. Dietz, *Payment of Court Costs by the Losing Party Under the Laws of Hungary*, in 1962 Proceedings of the ABA International and Comparative Law 131 (1963).

112. M. Cappelletti & J. Perillo, *supra* note 85, § 9.10.

113. R. Ginsburg & A. Bruzelius, *Civil Procedure in Sweden* 62-63 (1965).

114. Baek, *supra* note 108, at 124.

115. Ehrenzweig, *supra* note 22, at 797.

V. THE EFFECT OF ALLOWING THE RECOVERY OF ATTORNEY'S FEES IN ALL CASES

Assuming the rule were changed to permit the award of reasonable attorney's fees in every case,¹¹⁶ what effect would such a change have on legal services attorneys and the poor whom they represent?

A. *Effect on Legal Services*

As stated previously in this article, a rule permitting the award of attorney's fees to the prevailing party would provide legal services with an alternative source of funds, helping to alleviate financial and political pressure.¹¹⁷ Likewise, such a rule would make every case a contingent fee case, thereby encouraging a large segment of the private bar to handle many "poverty" cases.¹¹⁸

Of course, it might be argued that a change in the American rule would obviate the need for legal services because the private bar could then conceivably handle every case on a contingent fee basis. This argument overlooks two considerations. First, a rule permitting the recovery of reasonable attorney's fees does not necessarily mean a recovery of the entire fee charged by a lawyer. It might be uneconomical for a private lawyer to take a small landlord-tenant case or a complex constitutional case because in both instances the fee would probably not be commensurate with the time or research needed to try the case. In the landlord-tenant action, although the amount of legal research and work required might be minimal, the time spent in court waiting for the case to be called might be prohibitive. Likewise in the constitutional case, the time spent in research alone might make it uneconomical for a private lawyer to take it. Second, a large part of legal services practice centers around administrative hearings before federal, state, and city agencies¹¹⁹ for which no award of attorney's fees may be available.

116. To effect this change, it would probably be necessary to make appropriate provisions by statute. For a proposed statute dealing with the award of attorney's fees see Stoebeck, *supra* note 22, at 211-18.

117. See text accompanying notes 17-20 *supra*. It is impossible to estimate exactly how much additional revenue might become available to legal services if counsel fees were awarded to the prevailing party in all cases. In the first year of operation, however, legal services won 75% of all cases that went to trial. Note, *Litigation Costs: The Hidden Barrier to the Indigent*, 53 *Geo. L.J.* 516, 516 n.1 (1968). Even if these statistics may vary every year, legal services will still receive a substantial amount of new revenue.

118. Even with every American lawyer shouldering a part of the responsibility for representing the poor, however, it has been estimated that there would still be a need for more lawyers. See note 9 *supra*.

119. For example, MFY Legal Services, Inc., a New York legal services corporation, reports that approximately 20% of their cases fall in this area. *Annual Report of Mobilization for Youth to the Appellate Division, First Department* 14 (1970).

One last issue should be considered. It could be argued that legal services should not benefit from a rule permitting the award of attorney's fees in all cases. As demonstrated earlier in this article, awarding counsel fees to legal services makes sense when the reason for the award is to punish the losing party or to shift the cost of policy enforcement to those who violate the particular policy.¹²⁰ Some might say that the recovery of counsel fees by legal services makes no sense in cases where the sole reason for the award is compensation of the prevailing party (who receives free legal assistance). To answer the argument, two facts must be kept in mind. First, the actual number of cases faced by a legal services attorney where compensation would be the sole reason for awarding attorney's fees would probably be small. In cases involving questions of consumer protection, fair employment, and even decent housing, counsel fees could be awarded on the ground that the costs of enforcing these policies must be borne by those who violate them.¹²¹ Second, even in cases where compensation of the prevailing party is the sole reason for the award, basic policy reasons still dictate the recovery. Legal services for the poor is free only to the indigent person. Someone has to pay for it and that someone—the taxpayer—should be compensated, the compensation being the increased effectiveness of the legal services program.

B. *Effect on the Poor*

Although a change in the rule might strengthen legal services and involve more private attorneys in representing the poor, it might at the same time discourage the poor from bringing suits by exposing them to a possible judgment for their opponent's legal fees if they lose the case.¹²² One judge has said that even if the present system is deficient in some respects, it is of benefit to the poor since "the doors of our courts are not closed to the small litigant who cannot risk being ruined by the imposition of his adversary's full expenses."¹²³

A recent New York case¹²⁴ presents one solution to the problem. A landlord successfully sued his tenant for back rent and, in addition, sought to recover his attorney's fees under a clause in the lease which obligated the tenant to reimburse the landlord for counsel fees incurred in such an action. Declining to award attorney's fees, the court stated that "[s]trong public policy consideration requires that in a case such as

120. See notes 49-53 *supra* and accompanying text.

121. Cf. *Hotel Martha Washington Management Co. v. Swinick*, 66 Misc. 2d 833, 836, 322 N.Y.S.2d 139, 142 (App. T. 1971).

122. See text accompanying note 106 *supra*.

123. *Farmer v. Arabian Am. Oil Co.*, 324 F.2d 359, 368 (2d Cir. 1963) (Smith, J., dissenting), *rev'd*, 379 U.S. 227 (1964).

124. *Edot Realty Co. v. Levinson*, 54 Misc. 2d 673, 283 N.Y.S.2d 232 (Civ. Ct. 1967).

this where the tenant is an indigent represented by the Legal Aid Society, such tenant should not be made or required to pay the landlord's counsel fees under such a standard provision as we have here."¹²⁵ To apply the lease provision against the tenant "would simply be to increase the judgment and make it even more difficult for the tenant to pay her rent."¹²⁶ The court thus suggested that, assuming the prevailing party's attorney's fees are to be paid by the losing party, the harm done by placing this extra charge on the poor outweighs the benefit of compensating the prevailing party for his legal fees.

In light of this case, a rule should be developed that whenever the losing party is poor,¹²⁷ he should not be required to pay the attorney's fees of the prevailing party, unless the court finds that the poor person has acted in bad faith in either bringing or defending the suit.¹²⁸ Such a rule is clearly justified on policy grounds and may be mandated by the fourteenth amendment.

As Mr. Justice Harlan stated in *Boddie v. Connecticut*:¹²⁹ "It is to courts . . . that we ultimately look for the implementation of a regularized, orderly process of dispute settlement."¹³⁰ Since a society should encourage the peaceful resolution of grievances in its courts, rules can be tested to see whether they further this policy objective. Clearly, a rule that would force the losing party to bear all legal costs might deter a poor person from suing even on a meritorious claim and to that extent is bad.¹³¹ While justice is hopefully not a matter of luck,¹³² there is an

125. *Id.* at 674, 283 N.Y.S.2d at 233.

126. *Id.*; cf. *Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331 (1948). In *Adkins*, the Court stated: "The public would not be profited if relieved of paying costs of a particular litigation only to have imposed on it the expense of supporting the person thereby made an object of public support. Nor does the result seem more desirable if the effect of this statutory interpretation is to force a litigant to abandon what may be a meritorious claim in order to spare himself complete destitution." *Id.* at 339-40.

127. For a possible standard see note 4 *supra*.

128. As in the case of changing the American rule to permit the recovery of attorney's fees, a provision exempting the poor who have acted in good faith from paying such fees could be incorporated into a statute. The general equity powers of a court could affect similar results but, for uniformity of result, the adoption of a statute would seem preferable. Of course, even under a statute the court would still determine whether the indigent has acted in good faith in suing or defending the action.

129. 401 U.S. 371 (1971).

130. *Id.* at 375.

131. In discussing the poor person's limited access to European courts, one commentator has stated: "And it is indeed little wonder that those who are systematically excluded from the official justice are turning to violent methods of self help." Cappelletti, *Social and Political Aspects of Civil Procedure—Reforms and Trends in Western and Eastern Europe*, 69 Mich. L. Rev. 847, 873 (1971).

132. See Goodhart, *supra* note 88, at 876-77.

element of risk in every case. Faced with these inherent risks and ignorant of court procedures, a poor person may decide not to sue rather than chance losing and being adjudged liable for his opponent's legal fees. If there is one segment of society which should be encouraged to vindicate its rights, it is the economically disadvantaged who are exploited to a greater degree than the more affluent.

As for the fourteenth amendment, the Supreme Court has held that a civil litigant may not be denied an opportunity to be heard.¹³³ Likewise, the Court has found that poverty may be the basis for invidious discrimination.¹³⁴ In *Boddie* the Court decided that, at least in some instances, a state may not limit access to its civil courts by the requirement of filing or other fees which effectively bar the indigent from commencing actions.¹³⁵

Every person, rich or poor, should have a right of access to the courts because "[a]s a practical matter, if disputes cannot be successfully settled between the parties, the court system is usually 'the only forum effectively empowered to settle their disputes'"¹³⁶ A rule requiring a poor person to underwrite all legal fees in an action which he loses, including one brought in good faith, while not directly limiting the access of the poor person to the court, indirectly limits such access in violation of due process. Whether or not he might have to pay his adversary's legal fees will doubtlessly influence an indigent's decision to sue. Similarly, since his access to the courts is being indirectly limited solely on the basis of wealth, any rule limiting access in this way would arguably violate the equal protection clause.¹³⁷

133. See *Schroeder v. City of New York*, 371 U.S. 208, 212 (1962); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 682 (1930); *Hovey v. Elliott*, 167 U.S. 409, 416 (1897); *Orchard v. Alexander*, 157 U.S. 372, 383 (1895).

134. See *Gardner v. California*, 393 U.S. 367 (1969); *Rinaldi v. Yeager*, 384 U.S. 305 (1966); *Lane v. Brown*, 372 U.S. 477 (1963); *Douglas v. California*, 372 U.S. 353 (1963); *Burns v. Ohio*, 360 U.S. 252 (1959); *Griffin v. Illinois*, 351 U.S. 12 (1956). In reaching this conclusion the Court has differed with an earlier view which held that "[t]he mere state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed, or color." *Edwards v. California*, 314 U.S. 160, 184-85 (1941) (Jackson, J., concurring).

135. 401 U.S. at 381-83. The *Boddie* Court did state, however, that "[w]e do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual" *Id.* at 382-83.

136. *Id.* at 387 (Brennan, J., concurring).

137. See *Boddie v. Connecticut*, 401 U.S. 371, 384, 388 (1971) (Douglas & Brennan, JJ., concurring). "[T]he promise of equal justice for all would be an empty phrase for the poor if the ability to obtain judicial relief were made to turn on the length of a person's purse." *Williams v. Shaffer*, 385 U.S. 1037, 1039 (1967) (Douglas, J., dissenting).

If, then, the poor litigant who has acted in good faith should be exempt from having to pay the prevailing party's legal fees, who should bear the cost of these fees—the prevailing party himself or the state? To force the non-indigent prevailing party to absorb the cost of his legal fees might arguably violate the equal protection clause. For a classification to be reasonable and not violative of the equal protection clause, it must include “all persons who are similarly situated with respect to the purpose of the law.”¹³⁸ What is the purpose of the rule exempting the poor litigant who has acted in good faith from having to pay the prevailing party's legal fees? Clearly it is to encourage him to use the courts as a method of resolving disputes. This is a benefit to society as a whole and the cost of achieving such an objective should be borne by the taxpayer and not placed solely on the shoulders of non-indigent litigants who prevail in their suits against the poor. In this sense, a rule forcing the non-indigent prevailing party to absorb his legal expenses may be considered “under-inclusive”¹³⁹ since many people who benefit from the rule are not similarly forced to bear their fair share of the costs. Even if a rule requiring the non-indigent prevailing party to absorb his expenses could pass constitutional muster, as a matter of fairness the state should not adopt such a rule. By winning the action the prevailing party has demonstrated that he has a presumptively valid claim or defense against the poor person. It would seem equitable, then, for the state to create a fund to pay the attorney's fees of parties prevailing in suits involving the indigent.¹⁴⁰

138. Tussman & tenBroek, *The Equal Protection of the Laws*, 37 Calif. L. Rev. 341, 346 (1949). The classification imposed by a law must be reasonable, i.e., it must be based upon real differences which bear a proper and just relation to the things in respect to which the classification is imposed. See *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Truax v. Corrigan*, 257 U.S. 312 (1921); *Southern Ry. v. Greene*, 216 U.S. 400 (1910); *Gulf, C. & S.F. Ry. v. Ellis*, 165 U.S. 150 (1897); *Barbier v. Connolly*, 113 U.S. 27 (1885).

139. *Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065, 1084 (1969).

140. The cost to the state may be mitigated by certain factors. First of all, a rule that awards attorney's fees to the prevailing party will deter frivolous lawsuits, thereby easing court congestion and saving the state money in this regard. Secondly, the state need only pay the reasonable attorney's fees of opposing counsel where the indigent has brought a meritorious suit or had a meritorious defense and lost. Whenever an indigent litigant acts in bad faith, the state should not pay. Finally, even with paying these additional expenses, the cost to the state would be less than that which would result from recent proposals that the state guarantee an indigent the right to counsel in civil cases. See Goodpaster, *The Integration of Equal Protection, Due Process Standards, and the Indigent's Right of Free Access to the Courts*, 56 Iowa L. Rev. 223, 248 (1970); O'Brien, *Why Not Appointed Counsel in Civil Cases? The Swiss Approach*, 28 Ohio State L.J. 1 (1967); Willging, *Financial Barriers and the Access of Indigents to the Courts*, 57 Geo. L.J. 253, 286 (1968); Note, *The Right to Counsel in Civil Litigation*, 66 Colum. L. Rev. 1322 (1966); Note, *Discriminations Against the Poor and the Fourteenth Amendment*, 81 Harv. L. Rev. 435, 450-52

It should be emphasized, however, that these considerations only support a rule exempting the poor who have acted in *good faith* from paying the prevailing party's legal fees. An indigent who sues or defends in bad faith should be forced to pay his adversary's legal fees as a penalty and the state should not underwrite such expenses.¹⁴¹ By paying fees under such circumstances, the state would actually encourage frivolous and groundless suits.

VI. CONCLUSION

It would seem that legal services attorneys may presently recover counsel fees in many situations under existing precedents. In order to encourage the participation of the private bar in the representation of the poor, legal services has an affirmative obligation to help make new precedents in this area. Hopefully the antiquated American rule which forbids the award of attorney's fees to the successful party will continue to be eroded and will ultimately be changed. If this occurs, the private bar could shoulder a significant share of the burden of representing the indigent and allow legal services to concentrate their energies on those cases which, for whatever reason, the private bar cannot or will not handle.

(1967); Note, The Indigent's Right to Counsel in Civil Cases, 76 Yale L.J. 545 (1967). As has been demonstrated, a rule awarding counsel fees in all cases may encourage the private bar to handle many of these cases on a traditional contingent fee basis, thereby obviating the need for the state to finance attorneys for the poor.

141. Obviously, someone who is "judgment-proof" cannot be forced to pay. If this is the case, there will at least be an unsatisfied judgment outstanding against him which can be executed when and if he is ever able to pay.

It has been suggested that since "abusive practices really emanate from the attorney," legal services should pay the opposing party's counsel fees where the action "was extremely frivolous, or where unduly dilatory and time-consuming tactics were adopted." Clark, Legal Services Programs—The Caseload Problem, or How to Avoid Becoming the New Welfare Department, 47 J. Urban L. 797, 806 (1970).

Public Citizen, Inc.

1346 Connecticut Avenue
Washington, D.C. 20036

June 22, 1973

Mr. Joseph A. Tedesco
Exempt Organizations Branch
Miscellaneous and Special Provisions
Tax Division
Office of the Assistant Commissioner,
Technical
Internal Revenue Service
Washington, D.C. 20224

Attention: T:MS:EO:R:1

Re: Public Citizen, Inc.--Employer Identification
No. 23-7104508

Dear Mr. Tedesco:

Your ruling is respectfully requested that Public Citizen, Inc. ("Public Citizen") may accept legal fees pursuant to the award or approval of a court without jeopardizing its exempt status under section 501(c)(4). Public Citizen was incorporated by Ralph Nader and others under the laws of the District of Columbia on March 29, 1971, has its principal administrative offices at 1346 Connecticut Avenue, N.W., Washington, D.C. 20036, and files returns with the Director of the Baltimore District.

I. STATEMENT OF FACTS

On June 8, 1972, the Internal Revenue Service issued a letter ruling to Public Citizen, holding the organization exempt from federal income taxation under section 501(c)(4) of the Internal Revenue Code. One portion of that ruling reads as follows:

page two

You have stated that you intend to comply with the IRS guidelines for organizations engaged in public interest litigation as set forth in Revenue Procedure 71-39 I.R.B. 71-48, to the extent such guidelines apply to organizations described in section 501(c)(4) of the Code.

Among the guidelines contained in Revenue Procedure 71-39 is the following:

.02 The organization does not accept fees for its service except in accordance with procedures approved by the Internal Revenue Service.

No procedures governing the acceptance of legal fees by public interest law firms generally have been approved or promulgated by the Service. Furthermore, Revenue Procedure 71-39 does not state to what extent, if any, its provisions apply to organizations exempt under section 501(c)(4) rather than section 501(c)(3). On behalf of Public Citizen, a ruling is respectfully requested that the proposed legal fee acceptance practices described herein will not occasion loss of the organization's tax exempt status under section 501(c)(4).

The statement of Public Citizen's purposes in its Articles of Incorporation includes the following:

A. The Corporation is organized exclusively for the promotion of social welfare, more specifically the following:

* * *

3. To promote, encourage and foster the establishment of organizations of lawyers and other professional persons working in the public interest to aid citizen involvement in, and to conduct research into, such areas as

page three

governmental responsiveness, consumer protection, corporate responsibility, protection of the environment, and civil liberties and civil rights.

The Articles also provide that "[n]o part of the net earnings of the Corporation shall inure to the benefit of any individual," and that, in the event of the dissolution or final liquidation of the Corporation, "[n]one of [its] property . . . nor any proceeds thereof shall be distributed to or divided among any of the directors of the Corporation or inure to the benefit of any individual." Instead, any property and assets remaining after the discharge of any obligations of the Corporation are to be distributed to one or more organizations exempt from federal income taxes under section 501(c)(3).

Public Citizen is expressly prohibited by its Articles of Incorporation from "participating in, or intervening in . . . any political campaign . . ." and from "carry[ing] on any activity not permitted to be carried on by a corporation exempt from federal income tax under Section 501(c)(4) . . ."

Pursuant to the purposes contained in its articles and bylaws, Public Citizen has hired three full-time attorneys, who are actively engaged in public interest litigation before courts and administrative agencies. Public Citizen expects to hire other attorneys to perform similar work in the foreseeable future. All attorneys employed by Public Citizen are paid fixed salaries by the Corporation. In every case, the salaries paid to Public Citizen attorneys are considerably lower than those paid by the federal government or private law firms to lawyers of comparable skill and experience for the performance of similar work. To date, neither Public Citizen nor any attorney employed by it has sought or received any legal fee for services rendered by such an attorney in connection with his employment by the Corporation. As a condition of his employment, each attorney has agreed that any fee received by him in connection with his employment will be turned over to the Corporation. No such attorney, or any other individual, or any entity other than Public Citizen, will derive any monetary benefit from any attorney's fee received in the situations described in this request.

Cases undertaken by Public Citizen attorneys are selected on the basis of the following criteria:

page four

(a) Whether an important public interest is involved;

(b) Whether there is a reasonable likelihood that a suit will be successful

(c) Whether, in addition to resolving the immediate conflict, a successful suit will be useful for its precedential value;

(d) Whether the potential client has sufficient resources to pursue the litigation through a compensated attorney qualified to handle it; and

(e) Whether the resources of Public Citizen permit the undertaking of the litigation.

Several of the cases in which Public Citizen attorneys have participated are described generally in the organization's first annual report to its contributors, a copy of which is filed herewith as Exhibit A. That report also describes the many non-litigation activities funded by Public Citizen and reveals that the \$75,000 budgeted to the Litigation Group's activities for fiscal year 1971-72 amounted to about 18 percent of the approximately \$415,000 budgeted by the organization to support the activities of eight groups and projects. Public Citizen's second annual report, which covers the year ended May 31, 1973, will be available soon and will be supplied to the Service for its assistance in ruling on this request.

The principal source of Public Citizen's funding to date has been contributions from individual members of the public, and it is expected that this will remain the primary source of Public Citizen's funding. However, attorneys employed by Public Citizen are currently engaged in certain litigation, in connection with which they may be awarded reasonable legal fees by a court. Because it would be impractical and otherwise undesirable for the Internal Revenue Service to have to pass on the prospect of each instance in which Public Citizen wishes to accept legal fees, the organization seeks

page five

here to establish as a general matter that its proposed fee acceptance practices are consonant with its exempt status.

Attorneys employed by Public Citizen propose to accept legal fees on behalf of the organization in the following situations and subject to the following limitations:

1. Statutory awards. A number of federal statutes authorize the payment of reasonable attorney's fees to counsel for successful plaintiffs. One such statute is Section 4 of the Clayton Act, 15 U.S.C. § 15, which provides:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee. (Emphasis added).

Attorneys employed by Public Citizen are currently representing plaintiffs in two consumer antitrust class actions brought pursuant to the above provision. In Goldfarb v. Virginia State Bar, 355 F. Supp. 491 (E.D. Va. 1973) (cross-appeals pending before the Fourth Circuit), an attorney employed by Public Citizen represents a home purchaser who is challenging on Sherman Act grounds the minimum fee schedules employed by Virginia attorneys to set legal fees for performing certain services. The suit is the first court attack on a fee-fixing system which has been called into question by the Justice Department and which, at the time the suit was initiated, existed in some form in thirty-four states. In Ditlow v. Pan American World Airways, Inc., Civ. Action No. 999-73 (D. D.C.) (filed May 22, 1973), Public Citizen attorneys represent an airline passenger who, on a recent trans-Pacific flight, was charged in accordance with a rate agreement which had not been approved by the Civil Aeronautics Board, and which plaintiff claims violated the antitrust laws in the absence of such approval. If plaintiffs are ultimately successful in either or both of these actions and a reasonable attorney's fee is awarded to the Public Citizen attorneys, said attorneys propose

page six

to accept such legal fees on behalf of Public Citizen unless, by so doing, Public Citizen's tax exempt status under section 501(c)(4) would be jeopardized. Because practices affecting consumers of goods and services are increasingly being successfully challenged under the federal antitrust laws, it is expected that Public Citizen and its attorneys will become involved in some other consumer class action suits under said laws and will be confronted on further occasions with the question of whether to accept legal fees provided for by statute.

2. Court-awarded fees in cases based upon statutory or constitutional provisions which do not expressly provide for attorney's fees. The federal courts may, in the exercise of their equitable powers, award attorneys' fees where the interests of justice so require. They have traditionally done so in three situations:

(a) Where plaintiff is successful in obtaining relief which confers a substantial benefit upon the members of an ascertainable class. When a plaintiff's efforts result in the award of damages or other valuable relief to a class of persons, the courts have traditionally permitted the payment of plaintiff's attorney out of the fund which has been created. The rationale of these cases has been that the other members of the class would have had to pay such fees had they brought the suit, and that they should not be unjustly enriched as a result of plaintiff's efforts in their behalf. See e.g., Mills v. Electric Auto-Lite, 396 U.S. 375 (1970).

(b) Where the opposing party has acted in bad faith. Where an unsuccessful litigant has exhibited bad faith--as, for example, where a defendant has protracted the litigation by raising utterly frivolous defenses--the successful party has generally been held to be entitled to an award of attorney's fees as a punitive measure. See e.g., Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 n.4 (1968); see also Hall v. Cole, 41 U.S.L.W. 4658, 4659 (May 21, 1973).

page seven

(c) Where a plaintiff has acted as a "private attorney general." Where a successful plaintiff has, through his court victory, vindicated a policy that Congress considered to be of highest priority, the courts have held that plaintiff should be awarded attorney's fees so that private citizens will be provided with an incentive to enforce that policy through private actions. See e.g., La Raza Unida v. Volpe, ___ F. Supp. ___ (N.D. Cal. October 19, 1972).

II. REQUESTED RULING

Public Citizen respectfully requests that the Service issue a ruling that Public Citizen may, without jeopardizing its exempt status under section 501(c)(4), accept attorney's fees in cases which:

1. Such fees are awarded by a court or agency in proceedings based on a statute which expressly provides for attorney's fees.

2. Such fees are awarded by a court or agency in proceedings based on a constitutional, statutory, or regulatory provision which is silent as to attorney's fees, but in which the court or agency is otherwise empowered to award such fees.

3. Such fees are provided for in a settlement agreement which is approved by a court or agency in proceedings of the type described in either paragraph 1 or 2 immediately above.

III. STATEMENT OF AUTHORITIES IN SUPPORT OF REQUESTED RULING

A review of the relevant authorities discloses that Public Citizen has met all of the stated criteria for accepting legal fees in the situations described herein and that there are ample precedents for permitting it to do so. In particular, the following reasons support the issuance of the requested ruling:

(1) Organizations exempt from taxation under section 501(c)(4) have traditionally been permitted to engage in income-producing activities without jeopardizing their exemptions.

page eight

(2) It would be inequitable to permit other exempt organizations to charge for the services which they render, while disallowing the acceptance of any fees by public interest law firms.

(3) Organizations exempt from taxation under section 501(c)(3) which provide legal services have generally been permitted to charge for their services without endangering their exempt status.

(4) The awarding of legal fees by courts fulfills important social policies.

First, it is clear that the requirement of section 1.501(c)(4)-1(a)(1) of the Treasury Regulations that a section 501(c)(4) organization not be operated for profit does not preclude such an organization from receiving any income or from engaging in any income-producing activity. Consumer-Farmer Milk Coop v. C.I.R., 186 F.2d 68, 71 (2d Cir. 1950), cert. denied, 341 U.S. 931 (1951); Monterey Public Parking Corp. v. United States, 321 F. Supp. 972, 975 (N.D. Cal. 1970). Thus, organizations exempt from taxation under section 501(c)(4) have been held to be "not operated for profit" in the following situations, among others:

--A corporation organized to conduct a free public radio forum for the dissemination of progressive social views is exempt from a tax on excess profits, even though it devotes one-third of its air time to--and receives substantial income from--commercial broadcasting activities. Debs Memorial Radio Fund v. Commissioner, 148 F.2d 948 (2d Cir. 1945).

--A corporation formed to construct and operate a public off-street parking facility is exempt, despite the fact that it receives income in the form of parking fees. Monterey Public Parking Corp. v. United States, 321 F. Supp. 972 (N.D. Cal. 1970).

--A rural electrical cooperative, which earns income from nominal membership fees, monthly charges for sales of power (at commercial rates), and monthly

page nine

amortization charges and which distributes net income to its members, is exempt. United States v. Pickwick Electric Membership Corp., 158 F.2d 272 (6th Cir. 1946).

- A war veterans' organization qualifies for exemption under section 501(c)(4) if its primary activity is the promotion of social welfare, even if its chief source of income is the operation of a resort concession, Rev. Rul. 68-455, 1968-2 CB 215, or the sponsorship of public bingo games. Rev. Rul. 68-45, 1968-2 CB 259.
- A gun club which provides community facilities for practice and instruction in the safe handling of firearms is exempt, despite its obtaining income from membership dues, range fees, and sales of ammunition and targets. Rev. Rul. 66-273, 1966-2 CB 222.
- A volunteer firefighting organization may be exempt under section 501(c)(4), even though its income is largely derived from the operation of social facilities for its members and the holding of public dances. Rev. Rul. 66-221, 1966-2 CB 220.
- An organization formed to counsel individuals in solving their financial difficulties and primarily funded by contributions is exempt, even though it makes a nominal monthly charge to cover the expenses connected with providing certain of its prorating services. Rev. Rul. 65-299, 1965-2 CB 165.

Second, in light of the fact that other organizations exempt under section 501(c)(4) are customarily permitted to charge for their services or to engage in other revenue-producing activity, it would be inequitable to deny to public interest groups such as Public Citizen the opportunity to accept legal fees pursuant to the award or approval of a court or agency. The Service has generally recognized that an exempt organization is given preferential tax treatment not because it provides socially desirable services without charge, but because it provides them at all. Thus, so long

page ten

as an organization does not violate some other policy or regulation, such as by serving as a subterfuge by which private interests may benefit themselves without incurring tax liability, it is entitled to an exempt status.

For example, in Rev. Rul. 69-545, 1969-2 CB 117, it was held that a hospital is exempt under section 501(c)(3), even though, with the exception of its emergency room,

[it] ordinarily limits admissions to those who can pay the cost of their hospitalization, either themselves, or through private health insurance, or with the aid of public programs. Patients who cannot meet the financial requirements for admission are ordinarily referred to another hospital in the community that does accept indigent patients.

Similarly, in Rev. Rul. 72-124, 1972-12 I.R.B. 6, it was held that "rest homes" for elderly persons, which were previously ineligible for 501(c)(3) exemptions unless they charged fees not in excess of their costs, may charge fees exceeding expenses under certain circumstances, since it is the providing of medical services and not the presence or absence of any profit which renders the organization "charitable." Accordingly, Public Citizen's exemption as a social welfare organization does not arise from its representation of the public interest without compensation, which unlike the subjects of the foregoing Revenue Rulings, it does on a regular basis. Its exemption stems, instead, from the facts that Public Citizen undertakes such representation at all, and that any revenue generated by such representation is precluded from benefitting any individual or other private interest.

Based upon these general principles, Public Citizen's right to accept court-awarded legal fees without jeopardizing its exempt status is clearer than that of either the hospital or rest homes which were the subjects of the above Revenue Rulings for the following reasons:

page eleven

1. The fees of those organizations were charged directly to their patients, while Public Citizen proposes to accept fees which are derived only from the resources of opposing parties or from recoveries which benefit a class of persons.

2. Public Citizen's fees will be subject to the award or approval of a court, which must be convinced of their reasonableness; no comparable review procedure exists for the fees charged by hospitals and rest homes.

3. The hospitals and rest homes compete directly with privately owned institutions; by contrast, most cases handled by Public Citizen attorneys have no fee-generating potential, and Public Citizen has, on a number of occasions, declined to accept cases expressly because the potential client is able to pay a compensated attorney and a competent attorney is readily available and is willing to take the case.

4. While the hospital in question considers a patient's ability to pay to be a precondition to admission and commonly refers non-paying patients elsewhere, Public Citizen weighs every potential case on the basis of criteria, such as those set forth at page four, supra, which do not consider the client's ability to pay (except to the extent that that factor might influence Public Citizen to refer the case to a private attorney).

5. As an organization exempt under section 501(c)(4), Public Citizen is less able to obtain funding through contributions than organizations exempt under section 501(c)(3), since donations to it cannot be deducted by the donors.

6. In many of the cases in which Public Citizen becomes involved, the awarding of legal fees will, in itself, perform a therapeutic function, since it deters other wrongdoers from committing the same violation as the particular defendant, and since it provides an incentive for other plaintiffs to bring similar actions in the future should similar transgressions recur; the paying of nursing home and hospital fees performs no such socially useful function. See pp. 12-14 infra.

A third reason why the requested ruling should be issued is that exempt organizations which provide legal services have traditionally been permitted to accept legal fees without

page twelve

endangering their exemptions. Section 2.02 of Revenue Procedure 71-39, 1971-2 CB 575, acknowledges that organizations providing legal representation for those whose civil rights are threatened have "long been recognized as . . . charitable," and these organizations have frequently been awarded legal fees. See e.g., Clark v. American Corp., 320 F. Supp. 709, 711 (E.D. La. 1970), aff'd, 437 F.2d 959 (5th Cir. 1971). (NAACP Legal Defense and Educational Fund lawyer awarded \$20,000 fee in civil rights case); Rev. Rul. 65-282, 1965-2 CB 21 (fee which was awarded to court-appointed legal aid lawyer in criminal case was turned over to legal aid society). The most recent indication that the performing of legal services for a fee is not inherently inconsistent with tax exemption was in Rev. Rul. 72-559, 1972-47 I.R.B. 8, in which the Service approved a 501(c)(3) exemption for an organization which finances selected young lawyers who establish private practices in economically depressed areas. Although the lawyers are expected to provide substantial amounts of free legal services, they are also expected to charge fees to clients who can afford to pay them and to develop a self-sustaining private practice within three years. For the six reasons listed above distinguishing it from the nursing home and hospital, Public Citizen's case for continued exemption is more compelling than that of the organization involved in Rev. Rul. 72-559. In short, the litigation activities of Public Citizen in furtherance of the public interest fall squarely within a class of legal activities which has for years been considered by the Service to warrant exemption from income taxation.

The fourth and perhaps most important reason why the requested ruling should be granted is that the awarding of legal fees by courts furthers social aims which have been deemed by the Congress and the courts to be important. The acceptance by Public Citizen of legal fees is especially compatible with its exempt purpose of promoting the social welfare in cases in which awards of attorney's fees by a court or administrative agency is expressly provided for by statute. For example, the awarding of legal fees under section 4 of the Clayton Act--as well as under other federal laws--is an important part of the federal regulatory scheme.

page thirteen

See Advance Business Systems & Supply Co. v. SCM Corp., 287 F. Supp. 143, 160-61 (D. Md. 1968), aff'd, 415 F.2d 55, cert. denied, 297 U.S. 920 (1970). Congress, in enacting such provisions, deemed it fitting that wrongdoers should pay the reasonable attorney's fees of those who were damaged by their acts, both to punish the guilty and to provide an incentive for aggrieved parties to enforce the congressional policy through court actions. See Newman v. Piggie Park Enterprises, Inc., supra, 390 U.S. at 401. Where attorney's fees are provided for by statute, the award of such fees is based on public policy considerations; it is irrelevant, therefore, that plaintiff's counsel may have agreed to serve without compensation in the absence of any award of attorney's fees by the court. See Miller v. Amusement Enterprises, Inc., 426 F.2d 534, 538-39 & n.14 (5th Cir. 1970) [Suit under Title II of Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b)]; Clark v. American Marine Corp., 320 F. Supp. 709, (E.D. La. 1970), aff'd, 437 F.2d 959 (5th Cir. 1971) ("[Congress] did not look, like Lear's jester, to the breath of the unfeed lawyer, but considered that the prevailing litigant should be able to pay the laborer the worth of his hire.") (Suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5k). The Congressional policy is apt to be especially well served where, as in Public Citizen's case, any fees will be channeled into other public interest pursuits, and the awarding of fees to a public interest organization will provide an incentive for other, similar groups to act as "private attorneys general" in later cases. Cf. United Church of Christ v. F.C.C., 465 F.2d 519, 528 (D.C. Cir. 1972). In short, the acceptance by Public Citizen of legal fees where such fees are provided for by statute promotes the Congressional policy underlying the particular statute and thereby furthers Public Citizen's purpose of promoting social welfare.

The acceptance of legal fees in cases in which fees are awarded by a court or agency to meet the ends of justice is also strongly supported by well established policy considerations and is compatible with the organization's tax exempt status under section 501(c)(4). In many such cases, of course, the courts award fees because plaintiff has served as a "private attorney general," advancing a socially important aim through

page fourteen

the prosecution of his civil action. See e.g., La Raza Unida v. Volpe, ___ F. Supp. ___ (N.D. Cal. October 19, 1972) (awarding attorney's fees in suit under National Environmental Policy Act). In these cases, the policies served by the awarding of legal fees are the same as those involved where such fees are provided for by statute. In some other cases in which courts have awarded attorney's fees without express statutory authorization, the underlying policy has been to deter parties from acting vexaciously or in bad faith by requiring those who do so to pay the attorney's fees of their opponents. Again, the awarding of fees, of itself, furthers a socially important policy.

Finally, attorney's fees have been awarded by courts without express statutory authorization in cases in which plaintiff has, through his efforts, bestowed a substantial benefit on a class of other persons. In any such case, attorneys and others employed by Public Citizen might devote hundreds of manhours of time, substantial amounts of money, and other valuable resources, to the creation of a common fund or other substantial common benefit. Public Citizen funds would have been expended to pay filing costs, expenses of transcripts of depositions and trial testimony, witness fees, printing and reproduction costs, travel and telephone expenses, and, most significantly, the salaries of one or two attorneys. "To allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense." Mills v. Electric Auto-Lite Co., supra, 396 U.S. at 392. The fact that Public Citizen attorneys may agree to participate in such cases without compensation because of the importance of the case to the furtherance of the social welfare, should not preclude Public Citizen from accepting a legal fee if, incidental to its efforts in support of the public interest, its attorneys are successful in creating a fund or other substantial benefit for others. See La Raza Unida v. Volpe, supra.

In summary, the reasons for issuing the requested ruling are compelling. The litigation activities of Public Citizen are substantially similar to like activities of legal service organizations which have long been permitted to accept attorney's fees without jeopardizing their exemptions. Other

page fifteen

exempt organizations have been allowed to charge directly for their services or to engage in revenue-producing activities far less essential to their exempt purposes than Public Citizen's litigation activities are to the furtherance of the social welfare. In light of these facts, it would be inequitable to prohibit Public Citizen from accepting legal fees pursuant to the award or approval of a court in cases involving the public interest. In addition to its inequity, such a prohibition would seriously thwart the advancement of policies articulated by the courts and the Congress favoring the awarding of attorney's fees in cases in which a party has bestowed a substantial benefit on others or has promoted an important national priority.

IV. PROCEDURAL STATEMENTS

Powers of attorney and declarations of representation are enclosed.

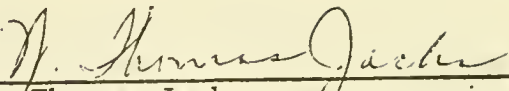
To the best of our knowledge, the issues presented herein are not pending before any field office of the Internal Revenue Service.

If the Service believes it advisable, or if a favorable ruling is not contemplated on the basis of this request, a conference is requested.

Please send the original of any ruling on this request, or any other correspondence related to this request, to the undersigned attorneys at 2000 P Street, N.W., Suite 515, Washington, D.C. 20036.

If further information is desired, please call either of the undersigned attorneys at 785-3704, in Washington, D.C.

page sixteen



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Enclosures:

"Exhibit A"--Public Citizen
Report, Issue No. 1,
1971-72

Power of Attorney

Declarations of Attorneys

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CHARITABLE DEDUCTIONS FOR PRO BONO PUBLICO
PROFESSIONAL SERVICES: AN UPDATED
CARROT AND STICK APPROACH

PETER D. BAIRD*

Although charitable contributions of money or property may produce income tax deductions, contributions of services to charity traditionally have not been deductible. The author contends that the increasing need for free professional services mandates congressional experimentation with charitable deductions for professional services.

To a significant degree, lawyers and other professionals work for lucre. Until the proper economic incentive can be found, America's *pro bono* legal problems will be handled largely, if at all, by a patchwork of traditional legal aid societies, government programs, a few public interest law firms, foundations, a variety of special interest organizations, and some private practitioners.¹ This mélange has been unable to do the entire job, especially for the poor.²

One answer is obvious. The private law firms, with their numbers,

* Member of the State Bar of Arizona. B.A., 1963, Carleton College; LL.B., 1966, Stanford. The author is grateful for the assistance of many at his law firm, particularly John P. Frank, Paul M. Roca, and Arthur P. Allsworth, and of his lawyer and wife, Sara Baird.

¹ See 42 U.S.C. §§ 2701-2994 (1970); Samore, *Legal Services for the Poor*, 32 ALBANY L. REV. 509 (1967-68); Voorhees, *Legal Aid: Past, Present and Future*, 56 A.B.A.J. 765 (1970); Wilging, *Financial Barriers and the Access of Indigents to the Courts*, 57 GEO. L.J. 253 (1968); Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069 (1970).

² "The traditional *pro bono publico* role of the private attorney and the efforts of government and privately supported legal aid have proved insufficient to meet the needs of unrepresented individuals and interests who are locked in the poverty cycle and unable to secure legal services." Ashman & Woodard, *Private Law Firms Serve the Poor*, 56 A.B.A.J. 565 (1970). "Despite the broadening of the legal aid program, in many cities and less populous areas the poor have few, if any, legal services from organized legal aid available to them, and equal justice is a reality in much less than half of the major communities of the country." Voorhees, *supra* note 1, at 767. "[T]here aren't enough lawyers to serve poor people . . ." Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1055 (1970). "[T]his vast program appears only to have scratched the surface of the widespread need for such services. . . . It has been estimated that between 14 and 20 million legal problems of the poor each year merit the attention of a lawyer." Wilging, *supra* note 1, at 268, 269. See Comment, *Unavailability of Lawyer's Services for Low Income Persons*, 4 VALPARAISO U.L. REV. 308 (1970).

experience, expertise, and political influence, must assume a more active role.³ Observing that "[t]he practicing bar has remained largely aloof," Justice Brennan asks us to face the "problem of devising more and better ways for lawyers to serve the public interest even while they remain fully engaged in private practice."⁴ Indeed, canon 8 of the new Code of Professional Responsibility states that "[t]he fair administration of justice requires the availability of competent lawyers" and that "[t]hose persons unable to pay for legal services should be provided needed services."⁵

Words alone, like those high sounding but too often hollow phrases in canon 8, will not reshape our profession. There must be an economic incentive. Before desperation pushes us to an expanded, federally funded program with its high cost,⁶ controls,⁷ politics,⁸ bureaucracy, and threat to the independence of the bar,⁹ we should experiment with something less drastic.

Consider a charitable deduction for lawyers and other professionals who render services to or through a tax exempt organization,

³ There is a persistent cry for greater participation by the private bar. See Cahn & Cahn, *Power to the People or the Profession?—The Public Interest in Public Interest Law*, 79 YALE L.J. 1005, 1025 (1970) ("[P]rivate law firms must become involved on an institutional basis in public interest work . . ."); Kirgis, *Law Firms Could Better Serve the Poor*, 55 A.B.A.J. 232 (1969) ("[I]ncreased systematic participation by private law firms is not only desirable, but inevitable . . ."); See also Ashman & Woodard, *supra* note 2; McGonagle, *New Lawyers and New Law Firms*, 56 A.B.A.J. 1139, 1140 (1970).

⁴ Brennan, *The Responsibilities of the Legal Profession*, 54 A.B.A.J. 121, 122, 125 (1968).

⁵ ABA, CODE OF PROFESSIONAL RESPONSIBILITY, Canon 8, Ethical Consideration 8-3, at 33 (1969).

⁶ The federal government has increasingly become the sustaining economic force behind public service poverty law in America today. "In 1964, 51 per cent of the financial support of legal aid came from community funds, 17 per cent from bar associations or lawyers and the balance from miscellaneous sources." Voorhees, *supra* note 1, at 767. By 1969, 82% or \$45 million of the total \$55 million budget came from the federal government. *Id.* And this money is not adequate; to handle the present case load properly, it is estimated that "the OEO legal services budget would have to be doubled." McGonagle, *supra* note 3, at 1140. Moreover, when funding judicare, which involved paying private lawyers with government money, the cost of these services was high: "[T]he cost per case under judicare is running almost three times that of the neighborhood law offices." Schlossberg & Weinberg, *The Role of Judicare in the American Legal System*, 54 A.B.A.J. 1000, 1003 (1968); Robb, *Alternate Legal Assistance Plans*, 14 CATHOLIC LAW. 127, 135 (1968).

⁷ Federal funds inevitably entail federal strings. For example, judicare required "a large amount of federal control." Schlossberg & Weinberg, *supra* note 6, at 1004. See also *The New Public Interest Lawyers*, 79 YALE L.J. 1069, 1106 (1970) ("A central difficulty arising from the need to seek financing from sources other than clients is that the source of funds may place explicit or implicit conditions on their use which make the lawyer less effective in his advocacy.").

⁸ With federal funding comes political debate about the legal services that are being underwritten. See generally McGonagle, *supra* note 3; Hannon, *Legal Services and the Local Bars; How Strong Is the Bond?*, 6 CAL. WESTERN L. REV. 46 (1969).

⁹ A legitimate concern has been voiced that some lawyers could become dependent upon government under the judicare program. See Robb, *supra* note 6, at 136. See also Hannon, *supra* note 8. Preserving the independence of the bar is essential to our system of freedom. See generally Black, *The Lawyer and Individual Freedom*, 21 TENN. L. REV. 461 (1950).

such as a legal aid society.¹⁰ The personal contribution of professional services can certainly be as significant and meaningful as the impersonal donation of cash or property. Apart from administrative considerations, there is no compelling reason to differentiate between absentee charity based on the transfer of money or property and the donation of professional time and talent.

One purpose for the charitable deduction is to encourage the private sector to perform tasks that otherwise would fall on government.¹¹ By creating an incentive for private practitioners to become personally involved in the *pro bono* work of our time, to represent the poor who come to legal aid societies for help, or to build the corporate structures of organizations dedicated to protecting the environment, we may avoid the necessity of greatly expanded federal participation. It is impossible to measure the strength of the incentive. However, since the charitable deduction for a partnership inures to the benefit of individual partners,¹² the senior partners in high tax brackets may be more interested in allowing or even directing the firm's associates to engage in *pro bono* legal work for qualified organizations.

Congress has never clearly said that section 170(c), which allows a deduction for "a contribution or gift to or for the use of"¹³ certain organizations, is restricted to the transfer of property or money. Since 1920, however, the Treasury Department has ruled consistently that "[t]he value of services rendered to charitable institutions may not be allowed as a deduction."¹⁴ Thus, there is a regulation stating that "[n]o deduction is allowable for contribution of services."¹⁵

Making professional services deductible undoubtedly would entail an amendment to section 170(c). Even though section 170(c) is not on its face restricted to money or property, a formal amendment, rather

¹⁰ Legal aid societies are eligible for tax exempt status. Rev. Rul. 69-161, 1969-1 CUM. BULL. 149. See also *Dulles v. Johnson*, 273 F.2d 362, 367-68 (2d Cir. 1959) ("[P]roviding free legal service through participation in legal aid, and providing low cost legal service through participation in a legal referral system . . . are in our opinion, educational and charitable."). *Tax-Exempt Status for Legal Aid-Lawyer Reference*, 25 LEGAL AID BRIEFCASE 21 (1966).

¹¹ HOUSE COMM. ON WAYS AND MEANS, H.R. REP. NO. 1860, 75th Cong., 3d Sess. 19-20 (1938):

The exemption from taxation of money or property devoted to charitable and other purposes is based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from public funds, and by the benefits resulting from the promotion of the general welfare.

¹² 5 J. MERTENS, LAW OF FEDERAL INCOME TAXATION § 31.32 (rev. ed. 1969).

¹³ INT. REV. CODE OF 1954, § 170(c).

¹⁴ O.D. 712, 3 CUM. BULL. 188 (1920). See Rev. Rul. 57-462, 1957-2 CUM. BULL. 157 (in which free newspaper space donated to charity was held to be a service and thus nondeductible); Rev. Rul. 162, 1953-2 CUM. BULL. 127 (in which the donation of blood was held to be nondeductible as a service); See also Chommie, *Federal Income Taxation: Transactions in Aid of Education*, 58 DICK. L. REV. 189, 190 (1954); Smith, *Income Tax Planning for Charitable Gifts*, 1953 ILL. L.F. 601, 611 (1953).

¹⁵ Treas. Reg. § 1.170-2(a)(2) (1958).

than a test case, would be required to accomplish the change. The long-standing revenue rulings,¹⁶ the regulations,¹⁷ the tax court position,¹⁸ the reenactment doctrine,¹⁹ persuasive case authority,²⁰ and congressional statements²¹ would all combine to prevent any judicial declaration that section 170(c) includes the contribution of services. Obvious problems surround this proposal. To prevent an unacceptable erosion of our tax base, limitations should be imposed on the breadth of any deduction for charitable services. To avoid widespread abuse, there must be realistic administrative means of verifying and measuring the services contributed.

There are at least two fundamental ways of restricting the scope of the proposed deduction. First, the eligibility of recipient organizations could be limited. Secondly, criteria could be drawn for the services themselves. At an absolute minimum, the recipient would have to be a charitable organization in order to fit within the present framework of section 170(c)²² and to avoid the administrative problem of policing charitable contributions made to other than qualified organizations. As a further limitation, the recipient's eligibility could hinge upon its being "organized and operated exclusively"²³ to work

¹⁶ See note 14 *supra*.

¹⁷ See Treas. Reg. § 1.170-2(a)(2) (1958). There was an earlier regulation, § 29.23(o)-1, of Regulations 111, which provided that if the gift is other than money the basis for calculation of the amount would be the fair market value of the property at the time of the contribution or gift. This was relied upon in a revenue ruling which predated Treas. Reg. § 1.170-2(a)(2) (1958), and which held services to be nondeductible. Rev. Rul. 162, 1953-2 CUM. BULL. 127.

¹⁸ Confronted with the claim by a lawyer and his wife that "they are entitled to deduct as a charitable contribution the value of legal services performed for their church," the tax court avoided the substantive issue and simply ruled that "the deduction must be disallowed here for failure of proof." Joseph P. Monaghan, 16 CCH Tax Ct. Mem. 159, 161 (1957).

¹⁹ *Helvering v. Winmill*, 305 U.S. 79, 83 (1938) ("Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law."). See generally 1 J. MERTENS, *supra* note 12, § 3.22.

²⁰ See *Orr v. United States*, 343 F.2d 553 (5th Cir. 1965). In *Orr* a claim for depreciation expense on an automobile used for charitable purposes was denied in part because "[a] depreciation expense . . . is not a 'payment', not a transfer of money or property." *Id.* at 556 (emphasis added). The court noted that "'payment' is an essential part of the definition of 'charitable contribution' in section 170(c)." *Id.* (emphasis added).

²¹ Although no clear or definitive guideline can be extracted from the legislative history of provisions for charitable deductions, there are repeated statements concerning wealth, money, property, amounts, and payments indicating that the deduction has been intended for tangible contributions of money and property. See generally HOUSE CONF. COMM., H.R. REP. NO. 172, 65th Cong., 1st Sess. 32 (1917); HOUSE COMM. ON WAYS AND MEANS, H.R. REP. NO. 1860, 75th Cong., 3d Sess. (1938).

²² This statute requires that the contribution be "to or for the use of . . . a corporation, trust, or community chest, fund, or foundation . . ." See also Rev. Rul. 62-113, 1962-2 CUM. BULL. 10, 11 ("If contributions to the fund are earmarked by the donor for a particular individual, they are treated, in effect, as being gifts to the designated individual and are not deductible.").

²³ Under INT. REV. CODE OF 1954, §§ 170(c)(2)(B), 501(c)(3), this phrase has acquired a fairly well-established meaning that could be used in the context of this proposal.

in a congressionally selected national problem area, such as poverty or pollution. Tax laws frequently have been structured to encourage solutions to our national problems. A recent example is promotion of environmental protection by permitting pollution control equipment to be amortized over a relatively short period of time.²⁴ The same is true with respect to coal mine safety equipment.²⁵

Standards and restrictions also would have to be designed for the services themselves. To ensure that the services would be subject to some reasonable form of objective evaluation, such as published legal fee schedules, the deduction should be limited to professional services for which a license would be required.²⁶ This would prevent a lawyer from claiming a deduction for cooking noodles for the church social—an activity that would be nearly impossible to evaluate for tax purposes. If additional narrowing were needed, the deduction conceivably could be further confined to “ordinary and necessary” services for the recipient organization, using existing rules formulated for testing the deductibility of business expenses.²⁷

For the most difficult problem of all, choosing which professions should be accorded deductions for their services, there are no easy answers. This would require a political value judgment: Which services are most essential, and thus to be encouraged, in solving America's problems? Yet selecting some professional services over others for a tax preference is not entirely new. Medical services are already favored by making them deductible to the recipient on a limited basis.²⁸ While certain awards made to writers, artists, and scientists are nontaxable, awards made to professional athletes are taxable.²⁹ In short, Congress may again have to pick and choose.

Fortunately, all these difficult lines need not be drawn at once. To test the efficacy of the basic concept, a two-part pilot program could be instituted for a limited time. The first part of the program would define a general, and very important, social objective such as alleviating the problems of the poor. In the second part, charitable deductions would be allowed for professional services contributed to or through organiza-

²⁴ *Id.* § 169 (as adopted by Pub. L. No. 91-172, § 704(a), 83 Stat. 667).

²⁵ *Id.* § 187.

²⁶ Guidelines for a professional act requiring a license can be drawn from state statutes and cases pertaining to the unauthorized practice of a profession. *See, e.g.*, ARIZ. REV. STAT. ANN. § 32-261 (Supp. 1971) (which prohibits the unauthorized practice of law). If it is deemed desirable to permit the deduction of the value of services not requiring a license, the deduction could be restricted to those services for which the donor regularly receives compensation.

²⁷ INT. REV. CODE OF 1954, § 162. The test would be whether the donated services would have generated a deduction under § 162, assuming hypothetically that the recipient was a taxable entity that had paid for the services.

²⁸ *Id.* § 213.

²⁹ *Id.* § 74; *see* Paul V. Hornung, 47 T.C. 428 (1967).

tions designed to provide specified services to the poor or for the selected objective.

For lawyers, the appropriate conduit could be a legal aid society. For doctors, it could be a poverty clinic. If the engineers, architects, or contractors so chose, they could organize their own specialized service groups, or broaden the scope of existing ones, to rebuild our inner cities. In this way, the necessity for singling out one or two professions over all the others might be avoided for the short run. With the thorniest problem at least temporarily shelved, the whole concept may be sufficiently attractive for Congress to experiment on a limited basis. If the program worked, the principle could be gradually broadened as other equally compelling social objectives were selected.

Naturally, there would be administrative problems, even under a limited pilot program. After all, transfers of cash and property are easier to verify and measure than contributions of professional services. But the situation is not beyond administrative solution. To verify that services were actually rendered, lawyers' time records, which are commonly maintained, could be audited. Additional and more detailed records could be required just as more detailed records are now required to substantiate travel and entertainment deductions.³⁰ Furthermore, since charitable organizations must file an annual report Form 990 and must list the names of their "substantial contributors,"³¹ the names of the service donors together with the dates and a description of their contributions could be supplied at the same time and provide a further means for verification. Even now, legal aid societies keep records on the number of privately donated legal hours in order to receive OEO funds.³²

There should be no great problem in the evaluation of legal services. Lawyers are accustomed to proving the reasonable value of their services. As a basic guide, local bar associations commonly publish suggested minimum fee schedules. The outer limit for deductions based on services could be calculated by the same formula that presently sets the maximum deduction allowed for transfers of cash and property.³³

The problem of evaluating and limiting claims for legal services has already been faced by the Office of Economic Opportunity when administering the *judicare* program, which involved government pay-

³⁰ INT. REV. CODE OF 1954, § 274(d). See also Treas. Reg. § 1.274-5 (1962).

³¹ INT. REV. CODE OF 1954, § 6033(b)(5).

³² To qualify for federal OEO funds, a legal aid society must raise 20% of its money from nonfederal sources. Under 42 U.S.C. § 2812(c), "Non-Federal contributions may be in cash or *in kind*, fairly evaluated, including but not limited to . . . *services*." (emphasis added). By maintaining records on the number of hours donated by private lawyers and by placing a value on these hours, the legal aid societies are able to count these hours in meeting their nonfederal quota.

³³ INT. REV. CODE OF 1954, § 170(b).

ments to private lawyers for *pro bono* work.³⁴ In determining whether local legal aid societies have met their quota of nonfederal money and thus are eligible for OEO funds, a dollar value is now being placed on the hours that private practitioners contribute to the society.³⁵ In short, in promulgating rules and regulations to safeguard against abuse, the Treasury Department would not be starting from scratch.

Overall, the proposal for charitable deductions for professional services calls for a significant departure from existing tax law and policy. Although there are problems to be faced and solved,³⁶ the situation is not necessarily beyond rational implementation. Given the importance of legal and other professional services to the solution of our urban, environmental, poverty, and racial crises, we must think creatively and seek new incentives before it is too late.

³⁴ Robb, *supra* note 6, at 131. In the Wisconsin judicare experiment, fees were computed at \$16.00 per hour or 80% of the minimum fee schedule, whichever was less, with a maximum of \$300.00 per case without prior approval of the judicare office.

³⁵ Donated hours must be "fairly evaluated." See note 32 *supra*. At present, private lawyers' hours are given a value of \$16.00 per hour. "Valuation of Volunteer Personal Services For Purposes of Computing the Non-Federal Share," OEO Instruction No. 6802-1 (Aug. 7, 1968).

³⁶ See generally Surrey, *Tax Incentives As a Device For Implementing Government Policy: A Comparison With Direct Government Expenditures*, 83 HARV. L. REV. 705 (1970).

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United States Senate

COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON REPRESENTATION OF CITIZEN INTERESTS

(PURSUANT TO SEC. 18, S. RES. 96, 93D CONGRESS)

WASHINGTON, D.C. 20510

October 20, 1973

Open Letter to the Delegates
 Regional Conference of State Bar Presidents
 Williamsburg, Virginia

Dear Delegate:

I would like to take this opportunity to say a few words about the work of the Subcommittee on Representation of Citizen Interests, because I feel that our work is of importance and interest to bar associations.

In recent years, both the nature and numbers of rights given to the average citizen have changed. We have more laws: they are more complex: they deal less with traditional property disputes and more with the environment, job safety, medical care, consumer protection, retirement, disability, and other aspects of our personal lives. Because these new rights intimately affect all Americans, unlike the traditional property rights which affected only property owners, the need for representation of all citizens has increased.

The very wealthy have never had any difficulty in retaining legal counsel. The very poor, with incomes under \$4,000 for a family of four, have access to OEO Legal Services, understaffed and underfunded, as these programs are. But millions of Americans in the middle income range, the large bulk of the intended beneficiaries of these new rights, cannot afford adequate legal assistance. The Association of Trial Lawyers of America has estimated that each day 30,000 legal questions which affect Americans personally go unresolved. Three major studies show that the predominant reason for not employing attorneys is the high price of their services.

From the attorney's perspective, the economics of lawyering affects, in large part both the location and type of his practice. One report showed that attorneys with big city corporate practice earned three times as much as the average attorney. Washington, D. C. has one lawyer for every 47 citizens. North Carolina, on the other hand, has one lawyer for every 1,000 citizens. The percentage of lawyers in sole practice has almost halved since 1948.

-2-

The economics of the legal profession has channeled many quality attorneys out of the business of representing the average citizen. The result is a growing chasm between the legal profession and its constituents, the citizenry.

Responding to evidence that the voice of the individual citizen is not heard in the range of formal and informal tribunals which affect his life, on May 10, 1973, the Senate approved the establishment of a new Judiciary Subcommittee on the Representation of Citizen Interests. The Subcommittee is charged with investigating the ability of any individual or group to obtain adequate legal representation in the settlement of grievances.

We have just completed six days of public hearings on various aspects of the subject of legal fees. We heard from both consumers and providers of legal services. The premise of these first six days of hearings was that legal fees affected, if not determined, the availability and quality of legal representation. As these hearings began to put flesh and blood on the bare bones of this original premise, it became quite clear--at least to me--that we hit the nail right on the head. Economics, both in terms of what consumers can afford to pay and what lawyers can afford to work for, is the nub of the issue.

During the course of these hearings, we heard from citizens about common problems involved in buying a home or a car, and affording a lawyer to help them. The author of a syndicated column on consumer affairs discussed the more than 25,000 complaints he has received in the last five years on routine matters like the above - and the intolerable frustrations involved in seeking redress. A professor of consumer law and founder of a number of consumer clinics discussed his use of nonlegal and paralegal assistants to cope with the flood of cases. All witnesses supported the notion of small claims or similar courts in their neighborhood, so that justice would be more accessible to them. Interestingly, this recommendation had also been made in the recent (September 28, 1973) report of the President's National Institute of Consumer Justice. The Subcommittee plans a joint hearing with the Consumer Subcommittee of the Senate Commerce Committee to receive the recommendations made in this report.

A day of hearings was devoted to the long-standing practice of minimum fee schedules and to the advantages and disadvantages of such schedules. Lewis H. Goldfarb, a home buyer in Northern Virginia, presented the situation he confronted in attempting to find an attorney who would charge him less than the minimum fee for a title search. As the Virginia State Bar is well aware, Mr. Goldfarb brought suit under the antitrust laws and prevailed against the Fairfax County Bar Association (a voluntary Bar Association) but not against the Unified Virginia State Bar.

-3-

On this latter issue, the Acting Assistant Attorney General of the Department of Justice, testified as follows:

"I think it is also important to note the areas in which minimum fee schedules tend to have their most severe impact. It is obviously not upon the well-to-do, or upon our large business corporations, that may have extensive legal business and the ability to negotiate with counsel as to an appropriate hourly fee. It is not necessarily upon the poor, who in recent years have been the recipients--and properly so--of subsidized legal services. But between these two extremes are a large number of middle-income wage earners who must--or at least should--consult the legal profession at least once in their lives, if only as to the purchase of a residence or the disposition of their estates. Here there are no subsidized services nor the ability to pay artificially inflated fees. Here the benefits of free and open competition are most essential."

He further testified that it was the view of the Department of Justice that both voluntary and integrated bar association were subject to the antitrust laws. The matter will ultimately be resolved on appeal.

The Subcommittee spent two days looking at two federal programs with different methods of financing needed representation. The Black Lung Benefits Act provides for an indirect federal subsidy of contingent fee awards to attorneys who secure benefits for miners at the state level. The Veterans' Benefit Programs, on the other hand, provide that no attorney can charge more than \$10.00 for securing a claim for a veteran. We explored each of these programs asking ourselves which method affords the best representation for the citizen at least cost to the taxpayer and the beneficiary of the program.

Last year, eleven attorneys in Kentucky each made between \$100,000 and \$1.08 million representing miners in obtaining "Black Lung" benefits under state and federal programs. Some claimed that these attorneys did little or no work to reap these huge rewards: they helped the miners to fill out a form which is unnecessarily complicated: they arranged for a medical examination by a doctor who always seems to find evidence of the disease: they argued what amounted to a "pro forma" motion before the State Workmen's Compensation Board. The attorneys, of course, claimed that they were providing badly needed representation to these miners and that they were worth every penny of the cost of their services. I cannot help but feel that there is a cheaper way to get quality representation for these miners at less expensive rates to the taxpayer and to the miners themselves.

Under the veterans programs, we heard about large numbers of veterans who went without the services of an attorney, when legal representation was necessary, solely because they could not find an attorney to take their case for the meager fee of \$10.00. Here again, the federal program does not seem to be well designed.

-4-

In the last two days of hearings, the Subcommittee looked into the recent trend of court awards of attorneys' fees to the prevailing party in litigation, often labeled "fee-shifting". In some cases the court is explicitly given the power to award attorneys' fees by a federal statute. One example is in the fair employment provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(i). In other situations, courts have implied this power where fee-shifting is deemed necessary to effectuate a strong congressional or constitutional policy. As the United States District Court for the Northern District of California per Judge Robert F. Peckham said in *La Raza v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972). "The rule briefly stated is that whenever there is nothing in a statutory scheme which might be interpreted as precluding it, a 'private attorney-general' should be awarded attorneys' fees when he has effectuated a strong congressional policy, which has benefited a large class of people, and where further the necessity of financial burden of private enforcement are such as to make the award essential."

As testimony in the hearings showed, fee-shifting will have its most potent effect where a plaintiff seeks only equitable relief. Analogous to the contingent fee mechanism, now widely employed by trial lawyers, if the attorney wins his client's case his fee will be paid by the losing party. If the attorney loses his client's case, the attorney will absorb the expense. Like contingent fees, fee-shifting will provide a method of making quality attorneys available to average citizens without a direct outlay of funds on the part of the citizen.

Through this mechanism, Congress can be sure that the laws which it passes in the environmental and consumer areas, among others, will not be repealed defacto because an aggrieved citizen cannot afford to obtain representation to vindicate the rights granted in that legislation. Through the courts' use of their equitable powers in this area, other laws too, may be more effectively enforced.

One problem which was raised at the hearings was the effect of 28 U.S.C. 2412 which prohibits awards of attorneys' fees against the federal government absent specific statutory authorization. Since many cases on behalf of previously unrepresented interests are brought against the federal government, proponents of fee-shifting suggested that legislative reform is needed in this area. They argued that the federal government is now subsidizing 50% of all business litigation, whether the suit is won or lost, frivolous or meritorious, because the cost of the attorneys' fees will be written-off as an ordinary and necessary business expense. The federal government pays 50% of G.M.'s attorneys' fees when it sues the United States to invalidate provisions of the Clean Air Act whether G.M. is ultimately victorious or not. It isn't fair they argue, not to award attorneys' fees to a private citizen who proves that some federal official violated federal law. In essence, these private citizens are acting as "private attorneys general". When these private attorneys general guard the guardians why shouldn't they receive an award of attorneys' fees.

-5-

Opponents argue that to allow awards of attorneys' fees against the federal government would encourage lawsuits against the federal government. Such a development they say, would flood the courts with frivolous litigation. Despite these charges, where Congress has already provided for fee-shifting against the federal government, courts have not been inundated. Moreover, courts have always retained the power to penalize plaintiffs with the costs of defendants' attorneys' fees where the plaintiffs suit is frivolous and brought solely to harass.

The Subcommittee is presently compiling the report on the hearings and on other information and comments received on the subject of legal fees. The official record will close on November 6, and a printed version should be available by the end of the year. The record may well generate legislative proposals in some of the areas studied.

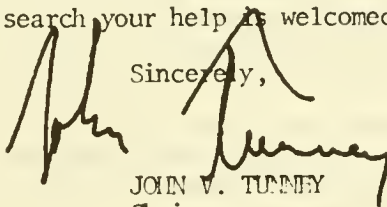
Legal fees has been the first area of public inquiry by the Subcommittee, but other issues are currently being studied and may be the subject of later hearings. These areas include legal education, professional responsibility, the pros and cons of specialization, the increased use of paralegal assistance, and possible changes in the code of professional responsibility concerning advertising and solicitation. Additionally, the Subcommittee is looking into complex questions involved with group and prepaid legal services plans, as methods of financing legal services to middle-income Americans.

As our inquiry broadens we welcome the comments, criticisms and suggestions of the organized bar. I have written to all the Presidents of every state bar association soliciting comments for the record on our first six days of hearings. As I said earlier, this record closes on November 6. I would like to take this opportunity to reiterate my request and the importance of the input which the organized bar can have into the Subcommittee's work. Chesterfield Smith, President of the American Bar Association, has written to me as follows:

"In my own judgment, there is no activity of the Congress which is more important to the American Bar Association, and to the national legal profession for which it speaks, than that of your Subcommittee: nor is there in my judgment any other congressional activity which has a greater possibility for lasting benefit for the citizens of our country in our never-ending search of equal justice for all."

As we begin this search, your help is welcomed.

Sincerely,



JOHN V. TUNNEY
Chairman

JVT/nlw

AMERICAN BAR ASSOCIATION
CODE OF PROFESSIONAL RESPONSIBILITY
CANNON 2
A LAWYER SHOULD ASSIST THE
LEGAL PROFESSION IN FULFILLING
ITS DUTY TO MAKE
LEGAL COUNSEL AVAILABLE

Disciplinary Rule 2-106 Fees for Legal Services.

- (A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.
- (B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:
 - (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
 - (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
 - (3) The fee customarily charged in the locality for similar legal services.
 - (4) The amount involved and the results obtained.
 - (5) The time limitations imposed by the client or by the circumstances.
 - (6) The nature and length of the professional relationship with the client.
 - (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
 - (8) Whether the fee is fixed or contingent.
- (C) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

AMERICAN BAR ASSOCIATION

OFFICE OF THE PRESIDENT
CHESTERFIELD SMITH
AMERICAN BAR CENTER
CHICAGO, ILLINOIS 60637
TELEPHONE (312) 493-0533

PLEASE REPLY TO:
1705 DE SALES STREET, N.W.
WASHINGTON, D.C. 20036

September 19, 1973

The Honorable John V. Tunney
United States Senate
Washington, D. C. 20510

Dear Senator Tunney:

I too enjoyed my meeting and lunch with you last week; and I am confident that the many close contacts which will be occasioned by our respective commitments during the forthcoming year will be pleasant indeed.

On behalf of the American Bar Association, I wish to express our deep interest in the program of your new Subcommittee to study the legal profession and its ability to afford all citizens the basic right to legal representation. As I mentioned in our meeting last week, the officers of the Association and its staff are fully prepared to cooperate with the Subcommittee in all feasible ways in this most important undertaking.

In response to the Subcommittee's request, I have asked Walter P. Armstrong, Jr., Esq., a distinguished lawyer from Memphis, Tennessee, and a former chairman and long-time member of the Association's Standing Committee on Ethics and Professional Responsibility to appear before the Subcommittee at its September 20 hearing on the subject of minimum fee schedules.

While the Subcommittee has determined to structure its initial hearings on the issue of legal fees, obviously an important determinant of citizen access to legal services, I would like to briefly sketch the Association's recent history of concern and action in the general area of availability of legal services.

Prior to 1965, the Association's program in the general area was confined to efforts to promote and stimulate lawyer referral systems and the development and support of traditional legal aid and defender activities. But in 1965, the House of Delegates

The Honorable John V. Tunney
 September 19, 1973
 Page Two

unanimously adopted a historic resolution pledging Association support to the then-fledgling program of OEO Legal Services for the Poor and creating a new Special Committee on Availability of Legal Services which was authorized "to study and make recommendations with respect to the adequacy and availability of legal services to all who need such services".

I was fortunate to have been appointed to that "availability" committee in 1965 and served as a member through the first four years of its life. It was largely through that special committee that the Association undertook a comprehensive and searching examination of many of the issues which appear to confront this Subcommittee in the months and years ahead. The special committee was able to focus considerable attention on the issues and problems presented by relevant ethical standards and unauthorized practice restraints.

It also developed the concept of prepaid legal services which holds the promise of greatly expanding the delivery of quality legal services to persons of moderate means. This concept is now being actively promoted by the Association in cooperation with state and local bar associations, labor unions, and consumer groups.

Other initiatives of the availability committee in the area of delivery of legal services deserve brief mention. It was within the availability committee that the idea for an independent legal services corporation for the indigent was first proposed. Largely because of that committee, the Association has provided leadership in the rapidly developing area of para-professional training, a development which is already reducing the cost of providing legal services in many areas of practice and also through committees to address the broad areas of specialization, lawyer referral plans and legal clinics, pro bono activities, economics of law practice, and law and technology.

Finally, Mr. Chairman, two Association endeavors now under way appear to have special relevance to the purposes of this Subcommittee. The first of these will provide the most comprehensive national survey of the legal needs, and the extent of present utilization of legal services, ever attempted. If the projected timetable is adhered to we anticipate that preliminary data from field work just begun will be available at our annual meeting in August 1974. A final report with conclusions and recommendations will then be undertaken and hopefully available in 1975. The results of this survey should be of great interest to the Congress, the public, and the profession.

The Honorable John V. Tunney
 September 19, 1973
 Page Three

The second development is the authorization in May of this year of a new Special Committee on the Delivery of Legal Services which is charged with studying alternative methods of providing legal services to various moderate income groups and to the public generally; making recommendations concerning the provision of legal services; instituting pilot projects to test and evaluate new methods of delivering legal services; and educating and involving members of the bar in improving the delivery of legal services. I am pleased to inform you that I have requested Stuart L. Kadison, Esq., Chairman of the new special committee, to provide continuing liaison with this Subcommittee.

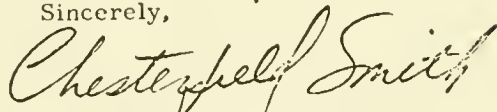
In my own judgment, there is no activity of the Congress which is more important to the American Bar Association, and to the national legal profession for which it speaks, than that of your Subcommittee; nor is there in my judgment any other congressional activity which has a greater possibility for lasting benefit for the citizens of our country in our never-ending search of equal justice for all. I have read carefully the release which you made as Chairman of the Subcommittee on Sunday, September 16, 1973, including the statement attached thereto and I find it most satisfactory.

The American Bar Association must carefully respect the rights and positions of its more than 170,000 lawyer members, so the formulation of policies and positions by the Association quite often is necessarily frustrating in its slowness. I have already asked appropriate Sections and Committees of the Association promptly to consider the work of your Subcommittee so that the Association may, to the extent possible, be in a position adequately to respond on matters which will be considered by your Subcommittee.

In closing, I offer my congratulations to you as Chairman of the Subcommittee on Representation of Citizen Interests for your thoughtful approach, and my best wishes to the Subcommittee for every success as it undertakes an ambitious and important program.

This brings my warm regards.

Sincerely,


 CHESTERFIELD SMITH

cc: The Honorable Marlow Cook



ALABAMA STATE BAR

OFFICE OF THE PRESIDENT

M. ROLAND NACHMAN, JR.

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MONTGOMERY, ALABAMA 36101

TELEPHONE
205-262-5721

November 5, 1973

The Honorable John V. Tunney
Chairman
Committee on the Judiciary
Subcommittee on Representation of
Citizen Interests
United States Senate
Washington, D. C. 20510

Dear Senator Tunney:

Since receipt of your letter of October 10, I have given considerable thought to the most helpful answer I could give, and in the process have studied your enclosed remarks, as well as your statement of October 20, which your associate Mr. Levy read to the Regional Conference of State Bar Presidents in Williamsburg.

I have concluded that, in view of the general nature of your remarks and the necessary breadth and generality of any reply, the most helpful thing I can do is make myself available to answer any questions which you or the committee might have, including questions relating to the extent of the jurisdiction and power of Congress to legislate about lawyers' fees.

I might add that our State Bar has abolished its minimum fee schedule (which was always advisory only), and it has had, for more than a year, a committee actively studying the important subject of legal services to the poor.

I shall await your further advice and suggestions.

Yours very truly,

M. Roland Nachman, Jr.
M. Roland Nachman, Jr.

MRN:lb1



STATE BAR OF ARIZONA, 234 NORTH CENTRAL AVENUE, SUITE 858, PHOENIX, ARIZONA 85004, (602) 252-4804

FROM THE OFFICE OF:

RICHARD A. SEGAL
PRESIDENT

234 N. CENTRAL, SUITE 300
PHOENIX, ARIZONA 85004
TELEPHONE (602) 286-6782

October 25, 1973

Senator John V. Tunney
United States Senate
Washington, D.C. 20510

Dear Senator Tunney:

Re: Judiciary Subcommittee on Representation
of Citizen Interests

Thank you for requesting my comments on the subject
of your current investigation.

I do not pretend to have any particular expertise
in this field of inquiry. There is no unique Arizona exper-
ience which would be of special interest to you. I will,
however, make a few comments concerning aspects of the in-
vestigation which may not have been emphasized by others.

A major reason why legal fees often appear to be
excessive is that the complexities of government and the court
system require so much time to accomplish even the most simple
objective. A lawyer in court or before an administrative body
or in any governmental agency must squander enormous quantities
of time in order to place himself in a position where he can
do something for his client. Thousands of lawyer hours must
be wasted every day in depositions, waiting rooms and the
administrative morass. This condition is frequently respon-
sible for the disproportionate relationship between the fee
and the benefit to the client. I am quick to recognize that
lawyers themselves are often the cause of this problem and I
acknowledge the obligation of the organized bar to attempt to
improve these conditions. However, when we are concerned with
adequate representation before governmental agencies, the ob-
ligation of government at every level to clear the path of the
citizen and his lawyer should not be ignored by your subcommittee.

The remarks which accompanied your letter contain
the implication that sole practitioners represent the source

Senator John V. Tunney
United States Senate

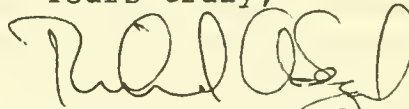
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October 25, 1973

of the "family lawyer". This is not necessarily true, although I agree that many members of the public believe it. In my opinion, the efficiencies and economies of group practice offer the best means of serving the public at a reasonable cost. Personally, I regret the passing of the county seat "squire", but the economic requirements of law practice seem to leave us with no alternative.

I hope that you will hear from lawyers who are engaged in the every day practice -- with all its problems and satisfactions -- before you reach any conclusions.

Yours truly,

A handwritten signature in dark ink, appearing to read 'RAS', with a stylized flourish at the end.

Richard A. Segal

RAS:dhc



ARKANSAS BAR ASSOCIATION

Office of the President

P. O. BOX 1446

FORT SMITH, ARKANSAS 72901

JAMES E. WEST
President

Telephone
(A. C. 501) 782-0361

October 23, 1973

Honorable John V. Tunney
United States Senate
Committee on the Judiciary
Washington, D. C. 20510

Dear Senator Tunney:

We will not have a meeting of the Executive Council or House of Delegates of the Arkansas Bar Association prior to November 6, 1973, so the comments made in this letter necessarily will represent my personal ideas rather than constituting a formal position of the Arkansas Bar Association. I am pleased that your committee is studying this matter, because it is a definite problem confronting many citizens.

One of the most difficult facets of the problem is that no one possible solution fits the entire United States. Remedies which might be effective in a sparsely populated state such as Arkansas can be completely ineffective in metropolitan areas, and the reverse similarly is true. This is the reason most potential solutions probably will fail if they are attempted in blanket form throughout the country.

It seems to me that some of the important considerations are as follows:

1. One of the most effective methods of making legal services readily available to medium income citizens is through a program of prepaid legal services. Such a program can be tailored to meet the situation in any geographical area. The greatest difficulty with this approach is that most citizens do not realize their need for legal services until it is too late. If the subcommittee could find a way to make the public aware of the need for prepaid legal services, great strides can be made in making legal services available to middle income citizens at a reasonable cost.
2. Development of more small claims courts in which citizens can obtain adjudication of small claims without the necessity of legal representation. The primary problem here is the funding of such programs.

3. Elimination of absurd restrictions on legal fees, such as the one imposed on Veterans' claims. The only result of such arbitrary restrictions is to deny a citizen legal representation.
4. Requirement that the government pay an attorney's fee to the citizen's attorney when the citizen successfully prosecutes a claim against the government.
5. Elimination of the causes of the need for legal services in the consumer interest area. The government should be encouraged to become much more active in discovering and stopping fraudulent and illegal schemes by persons against consumers, and by prosecuting those guilty of such illegal acts. Even more important, the government should establish an effective advertisement campaign to warn citizens against various fraudulent or questionable schemes or programs which are rather common.
6. In my opinion the answer to the problem does not lie in the area of imposition of arbitrary restrictions on attorneys' fees. The most honest, conservative and reasonable attorney has difficulty in estimating a reasonable fee in advance of a particular transaction. For example, the examination of one abstract by an attorney might require one hour, while the examination of another abstract of the same size might require twenty hours. If an attorney is restricted to a nominal fee for title examination, his choices include; (a) refusing to handle this type of business; (b) attempting to examine the abstract as rapidly as possible to keep from losing too much money on the transaction, and thereby running the risk of making an error in his examination; or (c) examining the abstract in his normal, careful manner, and sustaining a substantial loss on the transaction. Lawyers are human, and given these choices a substantial number are likely to select alternatives (a) or (b). What some people tend to overlook is the fact that attorneys have high overheads which continue regardless of whether or not the attorney is engaged in productive legal services. Moreover, the attorney has gone through a long and expensive educational process before being licensed to practice law. For the most part, attorneys are intelligent and industrious men who would have succeeded in any other profession or business they might have engaged in if they had not elected to practice law. As long as we have any type of society short of communism, the men who are lawyers will have the ability to earn incomes at a professional level. Even in a communistic country, such men would rise to positions of power.

Page 3

What I am trying to say is that any attempt to solve the problem by placing arbitrary limits on attorneys' fees will either deny legal services to the person sought to be helped, or will cause the quality of such services to be drastically curtailed.

Sincerely yours,

James E. West

jk



THE COLORADO BAR ASSOCIATION

ANTHONY W. WILLIAMS, PRESIDENT • BOX 338 • GRAND JUNCTION, COLORADO 81501 • PHONE (303) 242-6262

October 24, 1973

The Honorable John V. Tunney, Chairman,
Subcommittee on Representation of
Citizen Interests
United States Senate
Washington, D. C. 20510

Dear Senator Tunney:

Your letter addressed to Mr. Lawrence M. Wood has been forwarded to the undersigned for response. Mr. Wood was President of the Colorado Bar Association until October 13, 1973 at which time the undersigned assumed the office. We welcome the opportunity to express our views in regard to the several questions posed under the caption "Remarks of Senator John V. Tunney, Chairman...". Due to the press of time, the contents of this letter must be considered only the comments of the undersigned since the governing body of the Colorado Bar Association will not have an opportunity to consider these several aspects in sufficient time to become part of the official record of the hearings.

CONSUMER ACCESS TO ATTORNEYS AND MINIMUM FEE SCHEDULES

The Colorado Bar Association has never had a minimum fee schedule although in the past several local associations within the state has made use thereof. To my knowledge, no effort has been made to enforce these minimum fee schedules on the theory that a violation thereof would be a breach of ethics by the attorney. Most of the locals which had such a schedule have now abolished the same. We are not confident that such schedules are a violation of any anti-trust laws, but the lawyers in Colorado feel that the schedules are not sufficiently significant to argue the position.

We are aware that circumstances can be found in which minimum fees create some inequities. For this reason, if an inequity is created, a person should be able to find a lawyer who would not abide thereby. Your illustration of a fee of \$500.00 to check title is unfamiliar in this area, and we do not know the particular problems that may be attendant to checking title in all of the various jurisdictions of the United States of America. Minimum fee schedules were

The Honorable John V. Tunney, Chairman
 Page 2
 October 24, 1973

never designed to require payment of more than a reasonable fee.

The problem of consumer access to attorneys is being pursued in almost every state. It is our opinion that no legislation should be considered relating to the question of minimum fee nor consumer access to attorneys. We think that any problems that do exist will be worked out by the attorneys and there are thousands of hours being spent throughout the nation working on methods of delivery of service in a manner so that all citizens can be served. In this connection, we would recommend support of legislation establishing an independent national legal services corporation who could then operate to provide legal services for the poor free from outside pressures, while preserving the traditional attorney-client relationship. Time should be permitted to determine whether delivery of service to individuals of moderate means will be effected by various prepaid legal service plans and other methods under consideration by the various State Bar Associations.

GOVERNMENT REGULATION AND SUBSIDY OF LEGAL FEES

We can see that there needs to be some revision in regard to current subsidies and limitations upon fees. Certainly the provision of a flat \$10.00 fee for an attorney to secure a benefit for a veteran is absurd. Congress can best decide the areas in which subsidies should be offered in the quest for benefits available from various agencies of the United States and under particular acts such as the Black Lung Benefits Act of 1972.

Colorado has endorsed the concept of a public defender system and within this jurisdiction it has worked well. This system will always have to be supplemented by the privilege of a judge to appoint a private attorney when a conflict arises within the defender's system, and the private attorney should be compensated at an hourly rate. So far as we are advised, this combination system adequately provides representation for people accused of crime. We do not feel that this system should be expanded into other areas except that this statement should not be considered a contradiction to our support of an independent national legal services corporation.

The Honorable John V. Tunney, Chairman
Page 3
October 24, 1973

REASONABLE ATTORNEY FEE AWARDS

The idea of assessing attorneys' fees against the losing party is not new. As your remarks have pointed out, there are many special statutes which shift the burden of a reasonable attorney's fee to the losing party. However, I ask you to note that in every example of such legislation of which I am aware, the subject matter is such that the plaintiff is ordinarily an individual seeking enforcement of constitutional rights against some person or organization of at least adequate means and only the plaintiff is entitled to recover attorneys fees. Any general legislation in this regard would be ill advised for the reason that a general rule that a losing party would have to pay attorney's fees might very well militate against the class of persons we are trying to help.

GENERAL COMMENTS

We are reluctant to see the Federal Government attempt to resolve all of the various problems that can exist in regard to attorneys' fees and delivery of legal services. Most of these problems are local in nature and should be left to the various states to resolve on their own accord. We do not claim that we have a perfect system, but we believe we have the best system heretofore devised by man, and we are constantly looking at ways of self-improvement. Criticism is good because it focuses the lawyers' minds on their own deficiencies. We believe that the independent national legal services corporation can go a long way toward solving many of the problems posed in your remarks. In like fashion, the criticism of inequities of attorneys' fees which may be created by minimum fee schedules will go a long ways toward solving this problem because the lawyers themselves are seeking methods and means of delivery of legal service to all persons regardless of means.

We thank you for the opportunity to express our thoughts in this regard.

Yours very truly,



Anthony W. Williams

AWW:bms

cc Mr. William B. Miller
Mr. Donald S. Stubbs



THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA

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November 5, 1973

Senator John V. Tunney
United States Senate
Washington, D. C. 20510

Dear Senator Tunney:

Your letter of October 16, 1973 did not arrive in time for our Bar Association to give you any in-depth comment, which I regret. Suffice it to say, that the Bar Association of the District of Columbia supports an inquiry into the subject of Legal Fees, as undoubtedly there is room for improvement on both sides of the question.

In large contingent fee recoveries, fees should perhaps be reduced below the normal 1/3 of the recovery. Perhaps a staggered formula such as used in New York would be of service.

On the other side of the coin, the \$10.00 fee limitation which exists in Veterans cases under 38UPSC 3404(c) should be greatly liberalized.

Certainly, our Association would delight in participating in any future hearings that you might hold, and if we can be of services to you between now and then, please do not hesitate to advise.

Sincerely,

Austin F. Canfield, Jr.
President

AFC/nm

CC: L. Carr, Jr.
W. Huey

STATE BAR OF GEORGIA



1510 Fulton National Bank Bldg Atlanta, Ga 30303 (404) 522-6255

November 5, 1973

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Hon. John Tunney, Chairman
 Subcommittee on Representation of Citizen Interests
 Committee on the Judiciary
 United States Senate
 Washington, D. C. 20510

Dear Senator Tunney:

I welcome your invitation to present my views on the subject of the ability of any individual or group to obtain adequate legal representation in the settlement of grievances.

The attached survey describes existing programs in Georgia designed to make the courts and administrative bodies in this State accessible to all of our citizens. I believe that your Subcommittee will be interested, too, in this survey because it mentions the extent of the need in our State for an expansion of existing services and the implementation of new services designed to enable all individuals and groups in this State to obtain adequate legal representation in the settlement of their grievances.

Respectfully yours,

F. Jack Adams
 President
 State Bar of Georgia

RHDjr/bg
 Enclosure

STATE BAR OF GEORGIA

SURVEY OF LEGAL SERVICES DELIVERY SYSTEMS
IN THE STATE OF GEORGIA

This survey is prepared to provide an over-view of legal services programs and needs in Georgia, to be useful in the identification of those Georgians whose need of legal services is, as yet unmet, to identify existing programs designed to provide legal services to Georgians who are indigents or who cannot afford to pay for legal counsel at present compensation levels, and to identify problem areas and financial needs of existing and propose programs. Two broad approaches to the program will be taken: (1) legal needs of all Georgians including indigents and the "working poor", (2) legal needs of indigents.

I. LEGAL NEEDS OF ALL GEORGIANS

A survey of the population of the State of Georgia conducted by Georgia Indigents Legal Services (hereinafter referred to as GILS) indicates that there are approximately one-million Georgians whose income presently falls below the federally established poverty level. Added to that number are a significant number of working poor and those whose budgets will be greatly strained by bills for legal services charged at the "going rate" in Georgia. To these people employment of legal counsel is either prohibitive or is viewed as a luxury which their meager budgets cannot support. An additional problem arises when, for example, a consumer suffers a very small injury or a citizen has a very small grievance to present. In such cases the small monetary amount of the damage or the relative unimportance of the grievance or complaint causes it to fall in a grey area in which the expense of employment of an attorney exceeds the value of the remedy sought.

Of course, any discussion about the level of legal fees and the availability of legal counsel must include some reference to minimum fee schedules for attorneys and to Georgia's efforts at creation of review mechanisms to handle excessive fee complaints from laymen.

STATE BAR OF GEORGIA

MINIMUM FEE SCHEDULE

At one time, the State Bar of Georgia had a suggested, voluntary, and unenforceable minimum fee schedule, but this schedule was cancelled and rescinded several years ago. The State Bar believes that the amount to be charged by an attorney is a matter of contract between the attorney and the client and that the State Bar should not intervene, although we often advise fee complainants to avail themselves of their existing civil remedies if they believe such action is justified. It is the hope of the State Bar of Georgia that the abandonment of the minimum fee schedule will result in a greater availability of legal services to Georgians who could not previously afford them.

FEE ARBITRATION

Of course, the other step in opening up legal services to the poor is to put them on a more equal bargaining level when legal fees are being discussed. Fee arbitration is one way to give laymen a more equitable bargaining position relative to that of the attorney. The State Bar of Georgia is actively seeking to create a mechanism for arbitration of excessive fee complaints brought by dissatisfied laymen. The State Bar has taken note of arbitration programs instituted by other states and is seeking to adapt the strong points of those programs to the needs found here in Georgia. The State Bar Special Committee on Disciplinary Rules Revision has recommended, in a 1972 report, the involvement of the State Bar in arbitration of fee disputes, but the proposals of that committee as to administrative machinery are being re-studied by the Bar as they proposed a system of voluntary arbitration.

It presently appears that the success of arbitration in our State requires the addition of a provision for mandatory arbitration. While careful planning goes on at the state-wide level, local Bar associations are also being assisted by the State Bar in their efforts to setup voluntary arbitration procedures.

GEORGIA CONSUMER SERVICES (GCS)

One very promising, but inadequately funded, pro-consumer program in Georgia is that directed by the Georgia Consumer Services Unit of the Georgia Department of Human Resources. GCS was created when the State of Georgia realized that a large proportion of legal problems facing Georgia's citizenry were consumer-related and that

STATE BAR OF GEORGIA

a substantial number of such problems were not being adequately handled under the legal services delivery system existing at that time. Established in 1969, GCS is designed to meet the basic needs of all Georgians with consumer-related complaints. The Unit operates a state-wide consumer WATS line which allows citizens to call free from anywhere in Georgia for advice and assistance in solving their consumer problems. The WATS lines bring in from one hundred to two hundred calls a day and the problems raised by the callers range from consumers requesting information about products and services to one-to-one counseling to solve problems of money management, credit, contracts and market-place injustices. Brought to the public's attention by public service advertising and by conspicuous advertising in State Social Services offices, the Unit expects approximately 35,000 calls this next fiscal year.

GCS also provides technical assistance and consumer materials to agencies involved in the development of local consumer programs through its field services unit. Approximately 200 federal, state and local agencies and more than 10,000 agency personnel have participated in the 525 consumer education workshops conducted by the Field Services Unit throughout the State of Georgia. This work by the Field Services Unit of GCS is an excellent example of joint federal and state action in service of our citizenry. (The training and creative unit of GCS coordinates public relations and produces training and educational materials for other divisions.) This unit edits a weekly newspaper column entitled, "Buyers Beware" which is printed in 87 weekly newspapers state-wide. This unit, also disseminates consumer alerts about consumer frauds which could affect large numbers of people in our State. The research unit of GCS conducts research into the nature and dimensions of consumer problems in Georgia and evaluates and monitors programs performance for effective operation.

Other activities of GCS include acting as a resource and information agency for State and Federal legislators and creating, in cooperation with the University of Georgia and the State Board of Education, a model consumer education curriculum which is now being tested in over 50 school clusters throughout the State.

The Georgia Consumer Program received active support from the Younger Lawyers Section of the Georgia Bar when it requested the section's aid in compilation of a directory of Georgia attorneys willing to handle cases on a reduced-fee basis. The Younger Lawyers Section helped GCS to compile this directory and the directory is being used on those occasions where consumers do not have an attorney or do not qualify for legal aid under the usual indigency standards. Lawyers in the directory are classified by location and the kind of cases they will handle.

STATE BAR OF GEORGIA

GCS arranges the appointment for the troubled consumer and then steps out of the picture to allow the privacy in the attorney-client relationship.

At present the Georgia Consumer Services' greatest problem is that of funding. State sources have diminished this year, and more money is needed to maintain and expand this program. Of course, this is presently a state funding problem but such an imaginative program merits federal as well as State support.

STATE PRE-TRIAL INTERVENTION PROGRAM

Another program which was created by the State government is the Georgia Department of Labor's Pre-Trial Intervention Program. This program, one of the most successful in the nation, has been successful in diverting first-offenders away from Georgia's penal system into a program training and counseling designed to rehabilitate the offender in terms of his attitudes and his skills in the market place.

The Pre-Trial Intervention Program requires the eligible offender to waive trial and other proceedings in exchange for the opportunity to earn a dismissal of the charges against him by successfully completing the counseling and training portions of the program.

In 1973, this program allowed 396 offenders with jobs to retain their job, to support themselves and their dependents and to stay out of a penal system which might tend to encourage them to commit additional, more serious, crimes. Another 125 participants failed to complete the program for various reasons. The re-arrest rate for those in the counseling state of the program was 1% and there has been a 4.6% re-arrest rate for those who have completed the program. These figures indicate that this program is quite successful in reaching its goals of fostering rehabilitation and reducing recidivism.

The Pre-Trial Intervention Program is funded by a State appropriation which is matched by grants from LEAA and the United States Department of Labor.

SMALL CLAIMS COURTS

As every consumer advocate is aware, absence of courts which are designed to be easily accessible to the citizenry can be as damaging to the rights of indigents as the absence of legal counsel. The State of Georgia has no uniform system of small claims courts which might open up legal processes to those citizens with low income or with grey area problems which could prevent employment of an attorney. A survey commissioned by Georgia Consumer Services in the summer of 1973, indicates that

STATE BAR OF GEORGIA

a majority of counties within the State of Georgia do not possess small claims courts, that the courts differ widely as to jurisdiction and operation and that most of the existing small claims courts are located within counties of small or medium-size population. Some of our heavily populated counties, most notable Richmond (Augusta) and Muscogee (Columbus), have no small claims courts at all. These circumstances have led James L. Austin, Jr., the Governor's 1973 intern who researched this area for GCS, to urge the creation of a uniform system of small claims courts in this state.

VOLUNTEER AID

In a report such as this it is also appropriate to note that even before the establishment of the G.C.S. Directory and G.I.L.S. our state-wide legal aid program, Georgia attorneys often represented laymen on a no-fee or reduced-fee basis. The law schools at the University of Georgia, Emory University and Mercer University have provided excellent legal aid to indigents for a number of years through their legal aid clinic programs. Some attorneys joined referral services set up by local bar associations which still exist today to handle cases on a reduced-fee basis and others volunteered, as in the case of the Cobb and Chatham County Bars and the Atlanta Bar's "Saturday Morning Lawyer's" program, to fill the personnel requirements of legal aid offices by actually working in these offices at specified times. It would be unfair to forget these contributions by thousands of Georgia's attorneys and citizen volunteers who gave, and continue to give, freely of their time and talent so that our less fortunate citizens can present their legal grievances effectively.

The Bar of Georgia deserves special recognition for accepting the great responsibility of providing legal counsel for indigents accused of crime. With the exception of Public Defender Programs in Fulton County and in seven or eight other judicial circuits, indigents are represented by court-appointed counsel who are paid less than half of what they would charge in similar cases where privately employed. The funds for these drastically-reduced fees are paid by the State of Georgia.

PREPAID LEGAL SERVICES PROGRAMS

Perhaps the future's brightest development in the area of assuring legal services for all Georgians will be the advent of the prepaid legal services concept to the State of Georgia. There is a great deal of interest on the part of the Bar and the public in the application of the insurance theory to legal services delivery programs now existing in Georgia. Such prepaid legal insurance, as it is sometimes called, would give Georgians the advantage of budgetable costs, preventive legal counseling, and legal counsel

STATE BAR OF GEORGIA

on the full range of legal problems, large and small. The State Bar's Committee on Legal Economics is studying existing and proposed prepaid legal services programs and will soon be prepared to advise Georgians of the proposed program or programs it thinks to be the best for the public.

II. INDIGENTS AND THE LAWGILS - GLSP

As noted in the beginning of this survey another avenue of approach to the problem of legal representation worthy of our examination is that of availability of legal services to indigents in Georgia. Georgians can feel pride in their achievements in this area thus far Georgia Indigents Legal Services, Inc. is a state-wide legal aid program which is the envy of many states. GILS, as it is called, consists of ten offices located in cities throughout the State of Georgia. GILS surveys indicate that their staff of 36 attorneys has the awesome responsibility of representing the 763,000 indigent Georgians who reside outside of the five-county metropolitan Atlanta area. Atlanta Legal Aid Society, Inc. serves the metropolitan Atlanta area and is the only non-law-school sponsored legal aid clinic which has not been consolidated under GILS auspices. GILS has been actively supported by the State Bar of Georgia since its beginning in late 1970. Utilizing funds provided by the Georgia legislature and matching funds from the United States Department of Health, Education and Welfare, the size, importance and services of GILS have increased dramatically since its founding three years ago.

In 1971, a companion non-profit corporation to GILS, Georgia Legal Services Program, Inc., (GLSP) was incorporated to accept OEO legal services funding for the express purpose of coordinating a state-wide legal services program and particularly to provide expanded legal services in Macon, Columbus, and Savannah. To insure coordination of GILS and GLSP, both were placed under the control of a single director.

The year of 1972, saw the GILS-GLSP program reach a capability of serving over one thousand new clients per month. This service capability was threatened seriously by the HEW and OEO funding crisis of this year -- a sudden and unexpected loss of \$465,000 in Federal funding -- and only quick action by the Georgia General Assembly providing an additional \$325,000 in funds saved GILS-GLSP from immediate financial collapse. The status and availability of HEW funding is still uncertain today. The removal of Federal funds from this nationally significant program has resulted in the retardation of its growth toward a size at which it could give even greater aid to the indigents of Georgia. Faced with the prospect of receiving no funding from the Federal level, and with the un-

STATE BAR OF GEORGIA

certainty of year-to-year financing by the Georgia General Assembly, Georgia's fine legal aid program is faced with an uncertain future.

GEORGIA PUBLIC DEFENDER SYSTEM

On the brighter side, legal services required to be furnished to indigent criminal defendants under the Argesinger decision may soon be provided by a State public defender system. The State Bar of Georgia and the Younger Lawyers Section are studying the State's needs for such a system and LEAA-funded pilot defender programs are being organized in Brunswick and Dalton, Georgia, with the help and advice of GILS-GLSP. The State Bar has consistently supported the creation of a State public defenders system and shall continue to do so. Until such system is adopted, however, Georgia attorneys will continue to shoulder the responsibility of providing counsel for indigent defendants in criminal cases, and they will continue to be appointed to handle indigents' defense cases on a reduced-fee basis as described above.

FEDERAL DEFENDER PROGRAM

A promising defender program designed to aid indigent criminal defendants in the United States District Court for the Northern District of Georgia is scheduled to begin operation early in 1974. A plan has been formulated to create a Georgia not-for-profit corporation, to administer the Criminal Justice Act in and for the Court. It will receive grants from the Federal Judicial Council and use the grant money to compensate staff attorneys, and qualified private attorneys on the approved panel, for their legal defense services. The proposed corporation which is a Community Defender Organization meeting the requirements in 18 U.S.C. 3006 A (h) (B), is designed to share the responsibility of indigents' defense between a full-time staff and qualified members of the private bar on approximately a 60 to 40 ratio, respectively.

Other noteworthy provisions in the plan are: (1) mechanisms for determination and review of financial need of defendants seeking representation, (2) provision for careful selection of staff and panel attorneys who will participate in the program, (3) provisions to insure that qualified defendants will be aware of their right to demand, or to waive, advice of counsel, (4) provisions making investigations, expert witnesses, and other services available to indigents upon proper application.

STATE BAR OF GEORGIA

CONCLUSIONS

This concludes the survey of programs which we think affect availability of legal services in our State. We can reach a few conclusions at this point, one of which is that the programs affecting Georgians' access to the courts and to administrative bodies are provided by Federal, State and private sources without apparent coordination or similarity. All of the programs designed to deliver legal aid and consumer counseling services do have one similarity, however, in that they are all too small and too poorly funded to provide all of the help needed by our citizens. The acquisition of more Federal and State funding is essential to the organization, growth and maintenance of nearly all the programs designed to serve the full legal needs of Georgians. Such Federal and State funding must be accomplished so as to provide a dependable source or critically needed money during the formative stages of these much-needed programs. For this reason it is imperative that the Senate take affirmative action on the Federal Legal Services Corporation Bill presently before it, H.R. 7284, and that the Senate's positive action be directed toward insuring that the Legal Services Corporation will be well funded for at least the next five to ten years. It is also desirable that the Legal Services Corporation be independent to the extent that it would give our legal aid programs the capability of giving Georgians quality legal services over a wide range of problem areas. Similarly, continued Federal support of Community Defender Organizations like our own Federal Defender Program is essential.

We conclude also from this survey that Georgians would stand to profit from changes made at the State level and in the private sector, as in the creation of small claims courts and prepaid legal services programs. In these areas, Federal intervention would not seem to be either needed or desirable. It can also be concluded that the State Bar has played an active part in the formulation and improvement of ideas aimed at meeting our citizens' legal needs. In terms of the long history of our State, a revolution in indigent and consumer services has occurred practically overnight. It would certainly be unfair to say that Georgians are not attempting to make the courts and legal services accessible to all our citizenry. The State Bar of Georgia is proud of its role in the promotion and creation of a number of the programs mentioned above and it will undoubtedly continue to aid in the creation and coordination of programs to fill the legal needs of Georgians in the future.



Georgia Department of Human Resources

CONSUMER SERVICES PROGRAM

October 26, 1973

Senator John Tunney
Senate Office Building
Washington, D. C.

Dear Senator Tunney:

Mr. Bob Davis of the Georgia Bar Association has advised us that he is working on data to be submitted to your committee on the legal problems of the poor.

He will be detailing to you some of the things that we have been able to do in the consumer field, but we would like to take this opportunity to emphasize the experiences we have had through our toll-free WATS line (25,000 calls last year) in the field of consumer problems of the poor and the lower income people. It has been our experience that consumer problems and the lack of inexpensive recourse is a major frustration in our society today.

We hope the material we gave the Georgia Bar Association on some of the solutions we have found will be helpful.

Sincerely,

Jacqueline C. Lassiter
Deputy Director

JCL/slm

Illinois State Bar Association

OFFICE OF THE PRESIDENT



WILLIAM P. SUTTER
ONE FIRST NATIONAL PLAZA — 5200
CHICAGO, ILLINOIS 60670

November 3, 1973

The Honorable John V. Tunney
United States Senator
Senate Office Building
Washington, D. C.

Dear Senator Tunney:

Thank you for your letter inviting the views of the Illinois State Bar Association with respect to the extremely important question of the availability of legal services. On certain of the aspects of this question, the Association has taken specific action - I shall attempt to identify these aspects while making clear where it is only my own views which are expressed.

To begin with your opening remarks, it is my personal belief that an adequate and accurate survey of the need for legal services has not as yet been made, and that absent such a survey, any discussion of the subject must necessarily be based on assumptions which may or may not be factually sound. One must bear in mind that not every dispute in which an individual finds himself embroiled merits the retention of a lawyer. Many disputes are not, in truth, legal in nature, and even those which are may be too small to justify the services of a professional, just as some repair jobs do not justify the hiring of a carpenter or plumber. It should also be borne in mind that, in most legal disputes, one of the parties will, if the case goes to final decision, be held to be in the wrong, even though such party commonly does not agree with the decision in that respect. Thus the fact, if it is one, that many people feel that they have grievances which could be satisfied if legal services were more readily and economically available does not necessarily prove that the delivery of legal services is actually inadequate. It is my personal belief that the present system of making legal services available is inadequate, but that it is not as inadequate as some would say. In any event, I know of no adequate and accurate survey to prove either my views or those of persons who feel more strongly on the subject.

Looking at delivery before turning to cost, the Illinois State Bar Association has adopted a state-wide lawyer referral service which it advertises and which employs a (WATS) line to the Bar Center in Springfield, so that potential clients may make a toll-free call to receive the name of an attorney who will be willing to meet with the client for a one-half hour conference. The fee for this one-half hour is set at ten dollars, with any further representation of the client to be negotiated between the parties. One of the reasons why I believe that the need for greater legal service delivery may be exaggerated is that, while this service is receiving inquiries at an annual rate of four thousand per year, only

approximately forty-one per cent of those who call the Bar Center asking the name of an attorney ever contact the one named, although eighty per cent of those who do so are found to have a genuine legal problem requiring the further services of a lawyer. Nevertheless, the expansion of the I.S.B.A. lawyer referral program into those counties in which we have as yet no participating lawyers is an important goal of the Association. In addition, we are actively seeking the development of local programs of the same type, and a number of local bar associations are presently conducting successful programs of their own.

Turning from delivery alone to the mixed question of delivery combined with prepaid, fixed costs, you are, of course, fully aware of the numerous experiments which are being conducted throughout the United States in the area of group legal services and prepaid legal benefit plans. The American Bar Association has played a reasonably active role in this field in the past, and is committed to playing a much more active role in the future. The Illinois State Bar Association recently conducted a day-long conference on the availability of legal services attended by forty-two persons, representing active committees working on various aspects of the problem, such as group legal services, lawyer referral, specialization, computerization, paralegals, prepaid legal benefits, legal aid, and the like. Out of this came a number of recommendations which are still being evaluated and placed in a priority listing. It is safe to say, however, that, whether the delay resulted from past inertia of the organized bar or not, experimentation with various approaches to cost-controlled legal services has not yet reached the point where any definite conclusions can be drawn. "Open panel," "closed panel," and a myriad of other questions remain to be answered, including the vital question as to whether the great mass of the public who belong to no collective bargaining group would be interested in paying in advance for future legal services through insurance or otherwise.

The Illinois State Bar Association is pleased that your Subcommittee is looking into all of these important matters, as we are. We urge you recognize, however, that quick and easy answers are not to be had, and that time, research and experimentation will be required. The problem may be a pressing one but this does not justify hasty and ill-conceived solutions.

Leaving the combined delivery and fixed cost area, and looking at fixed cost of legal services generally, I would call to your attention that quality legal representation, like quality in anything else, is partially a function of price. Cut-rate legal service cannot reasonably be expected to be comparable to full-rate service, except in those instances where the one delivering the service makes a conscious decision to accept less than its fair market value. So far as fee schedules are concerned, Disciplinary Rule 2-106 of the Illinois Code of Professional Responsibility provides that a lawyer shall not "enter into an agreement for, charge, or collect an illegal or excessive fee." The Rule further sets forth a number of factors to be considered in determining the reasonableness of a lawyer's fee, including, among others, the time and labor involved, the novelty and difficulty of the questions involved, the skill required to perform the legal service properly, the fee customarily charged in the community for such service and whether the fee is fixed or contingent. You will note that locally customary fees are but one factor to be considered.

The Board of Governors of the I.S.B.A. has determined that a schedule of such customary fees "may have a practical utility to lawyers and members of the public solely as a means of informing the bar and the lay public as to what may be customary charges for legal services in a particular area." At the same time, utilization of such a schedule is entirely voluntary and no effort is made by the I.S.B.A. to determine compliance or to enforce adherence to it. Thus, I feel sure that the problem to which you refer, involving Virginia real estate closings, is, if not nationally atypical, at least unrelated to Illinois.

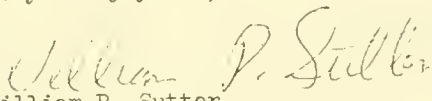
Contingent fees are, admittedly, a controversial type of fee and the subject of considerable debate from time to time. I understand that such fees are not utilized in Great Britain, where each litigant is required to pay whether he wins, loses or draws. In situations involving protracted litigation, therefore, the contingent fee may well be the best solution for the average litigant; the question then becomes, "what percentage is reasonable?" Absent detailed analysis of recoveries, costs and contingent fees in different types of litigation in different areas, an answer is impossible. In any event, an absolute answer would undoubtedly be incorrect.

With respect to the representation of criminal defendants, you should be advised, first, that contingent fees are barred by Disciplinary Rule 2-106 in criminal cases. In Illinois, public defender programs are well established in some areas and are utterly lacking in others. We have sought to encourage their development through local bar associations and, in 1969, the I.S.B.A. actively worked for enactment of a State Defender General system. Passage could not be obtained through the legislature because of funding problems. However, an Appellate Defender Program bill which the I.S.B.A. supported became effective October 1, 1972. We are pleased that this much progress has been made.

Finally, as regards reform of the profession, I concur that the practice of law is both a noble profession and one which requires constant improvement. I do not agree with those who, pointing to the number of lawyers mentioned in connection with the Watergate, assume that the percentage of venal attorneys is unusually high. To the contrary, I believe that the record of the legal profession can be matched against that of any other business or profession in quality of product and integrity of performance. This does not mean, of course, that improvement in the discipline of those who deviate from the Code of Professional Responsibility should not be improved. In Illinois, a newly adopted Attorney Registration Commission under the supervision of the Supreme Court and funded by annual registration fees will, we believe, achieve such improvement.

The Illinois State Bar Association welcomes the interest which Congress is showing in the legal profession and its relationship to the public. We will be happy to cooperate in your studies and ask only that preconceived notions be regarded warily.

Very truly yours,


William P. Sutter
President

eb



THE IOWA STATE BAR ASSOCIATION

F. W. TOMASEK, PRESIDENT

GRINNELL.....IOWA 50112

815 FIFTH AVENUE

Telephone 515 — 236-3109

November 7, 1973.

Hon. John V. Tunney,
United States Senate,
Committee of the Judiciary,
Washington, D. C. 20510

Dear Senator Tunney:

Please accept my belated answer to your letter of October 11, 1973. Various circumstances prevented my making an earlier reply, and I hope that this communication will reach you in time for your purposes.

The Iowa State Bar Association is keenly aware of the necessity for representation of citizens interests, and we are very much in sympathy with the purposes and objectives of your Committee. I have read with great interest the copy of your remarks which was enclosed in your letter.

The Iowa State Bar Association has a special Committee on Legal Aid and Client Referral, and also a special Committee on Methods of Appointment of Court Approved Counsel. The problems which you have set forth are also given consideration by the Bar Economics Committee.

In addition to the work by committees associated with the State Bar Association, various of the larger cities of the State have Lawyer Referral Committees. They include Des Moines, Cedar Rapids, Waterloo and several others. In the course of preparing this report to you, a bulletin from the Lawyer Referral Service of Polk County Bar Association, Des Moines, under date of September 20, 1973, reached my desk. I am enclosing a copy.

The Iowa State Bar Association maintains a State Headquarters, and Mr. Edward H. Jones, Secretary of the Association, is Executive Director of the headquarters. Mr. Jones and his staff will be ready at all times to provide you with information, material and reports of activities in this State, and I am sure, will be anxious to assist you and your Committee in its important work in any way that can be done.

Hon. John V. Tunney

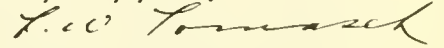
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November 7, 1973.

In mid-September I attended a Regional Conference sponsored by the American Bar Association and under the direction of the President, Chesterfield Smith. The work of your Committee was described by Mr. Smith, and was the subject of a very interested and sympathetic discussion by the Bar Officers and Executives present.

If I can be of any further assistance in this or any other matter, please let me hear from you. I wish you the fullest measure of success in carrying forward the very important assignment of your Committee.

Very truly yours,



F. W. Tomasek.

FWT:yks

LAWYER REFERRAL SERVICE
OF
POLK COUNTY BAR ASSOCIATION

1101 Fleming Building
Des Moines, Iowa 50309
Telephone 515 280-7429

September 20, 1973

TO: Polk County Attorneys

The Polk County Bar Association Lawyer Referral Service started in November, 1972. Since that time approximately . . .

800 calls and inquiries have been received and

341 actual referrals have been made to individual attorneys.

The matters referred have ranged widely over all phases of the law.

This Fall the yellow pages in the new telephone directory will contain a more visible reference to the Service. Television spots provided by the ABA will continue to appear. The rate of referrals is increasing.

You are invited to join the present panel of 95 attorneys and increase the availability of legal services to the public.

An application blank is enclosed. The \$15.00 annual registration fee will entitle you to participation on the panel through 1974.

Lawyer Referral Service Committee

Enc.

APPLICATION TO
POLK COUNTY BAR ASSOCIATION
LAWYER REFERRAL SERVICE PANEL

To Lawyer Referral Service Committee:

I, _____, for application to the Polk County Lawyer Referral Service, hereby declare that the answers set forth below are correct and I agree to be bound by the rules of the Lawyer Referral Service, a copy of which I have received and read. I hereby state that I am a member in good standing of both the Polk County and the Iowa State Bar Associations and that I am actively engaged in the full time and private practice of law in Polk County. I now have, and agree to maintain, professional liability insurance in the minimum amount of \$25,000 and to provide proof thereof each time my annual registration fee is paid. I further agree to pay on or before February 1 of each year to the Lawyer Referral Service \$15.00 as the Annual Registration Fee for that calendar year, and I agree to pay a prorated amount if I am registered for any period less than a full year. With respect to each referral, I agree to render an initial one-half hour consultation for a fee of \$15.00, of which \$3.00 shall be promptly forwarded to the Lawyer Referral Service by me.

- 1) Educational Background
 - a) College - (Graduation date-)
 - b) Law School - (Graduation date-)
 - c) Specialty School - (Graduation date-)
- 2) Date of Admission to Bar
 - a) Iowa -
 - b) United States District Court,
Southern District of Iowa -
 - c) Other -
- 3) Bar Memberships:
 - a) Polk County -
 - b) Iowa -
 - c) ABA -
 - d) Other (specify) -
- 4) The areas in which I will NOT accept cases are crossed out on the list appearing below:

Administrative Agencies	Landlord and Tenant
Bankruptcy	Patents and Copyrights
Civil Rights and Discrimination	Personal Injury
Collections	Probate, Guardianships, Conservator-
Consumer Problems	Property Damage ships
Corporations and Partnerships	Real Property and Abstracts
Criminal Law	Selective Service
Domestic Relations	Traffic
Employer-Employee	Uniform Code of Military Justice
Estate Planning and Wills	V.A. and Social Security Matters
Immigration	Workmen's Compensation
Income Tax (Litigation-Preparation)	Zoning
Juvenile	

Date _____ Signature _____
Office _____ Office _____
Address _____ Telephone _____

GOLDBURN & WALKER
ATTORNEYS & SOLICITORS
FIRST NATIONAL BANK BUILDING
4 COURTHOUSE SQUARE
ROCKVILLE, MARYLAND 20850

AREA CODE 301

762-6551

November 2, 1973

The Hon. John V. Tunney
United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Dear Senator Tunney:

Your letter to Norman P. Ramsey, Esquire, President of the Maryland State Bar Association, has been referred to the Economics Committee of which I am chairman. My remarks are somewhat personal but I feel that they are shared by the members of my committee, the Board of Governors and the members of the Association.

I have recently conducted a survey of the bar associations of all of the states and the District of Columbia and have been informed by the forty-five associations responding that only two states currently have a minimum fee schedule, viz., Texas and Alabama. Most of the others have rescinded their schedule within the past 18 months or, in fact, never had one to begin with. Except for the real estate field, it is my opinion that, at least in Maryland, such schedules were never widely in use except as a handbook for a type of case with which an attorney was not readily familiar. These schedules were merely advisory. Why the Fairfax County Bar Association considered "undercharging" the minimum fee schedule to be unethical, in view of the A.B.A. formal opinion number 323, a copy of which I am attaching, has puzzled me. You will note that that opinion states a completely contrary view.

We are, of course, in favor of the assistance that the Federal government gives to certain classes of people so that they can obtain proper legal services. The ones that you mention are particularly appropriate and should be extended where a citizen has a right that is being withheld by an unfeeling bureaucracy. The fees, however, must be reasonable. Obviously, an attorney cannot handle a veteran's claim for ten dollars. An hourly rate is the fairest form of compensation. It must be remembered that the compensation paid to an attorney for an hour's services does not inure entirely to him. It must be used to pay his staff, overhead and the like. While the Government needn't be expected to pay at the normal hourly rate of compensation, it must take into account a realistic rate that will allow indigent clients access to a fair number of lawyers. The lawyer who would be dissatisfied with the rate that the Government would provide could, of course, always decline

LAW OFFICES OF GOLDBURN & WALKER

- 2 -

The Hon. John V. Tunney
November 2, 1973

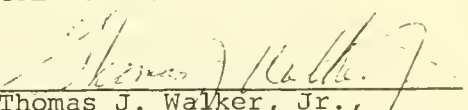
to represent the indigent. It has been my experience, however, that lawyers do a great deal of work for which they do not receive remuneration. These services, unfortunately, go unheralded.

Certainly, no citizen should be without representation because of his economic status but we must remember that the rights that are said to be protected legally must be necessary ones rather than what I choose to call discretionary ones. By this I mean, for instance, that everyone has a right to draw a will although everyone needn't have one. It is in his or her discretion to contract for such a service, whereas a citizen who is being denied his Social Security or his liberty in a criminal proceeding is being denied a basic essential right, i.e., the right to an income and freedom.

I hope that these remarks help in the deliberations of your committee and if there is anything further that we can do to assist, please let me know.

Sincerely,

GOLDBURN & WALKER

By 
Thomas J. Walker, Jr.,
Chairman, Economics Committee
Maryland State Bar Association

TJW:dk

cc: Norman P. Ramsey, Esquire
Hal C.B. Clagett, Esquire

Enclosure

CLARENCE
Walter P. Armstrong, Jr.
Commerce Title Bldg
Memphis, Tenn 38103

Standing Committee on Ethics and Professional Responsibility

Thomas J. Rondelli
Chicago, Ill
Benjamin F. Gates
Columbia City, Ind
Charles W. Joiner
Detroit, Mich
Kirk M. McAlpin
Atlanta, Ga

AMERICAN BAR ASSOCIATION

Floyd B. Sperry
Rumson, N. J.
Lynn M. Tondel, Jr.
New York, N. Y.
Lewis H. Van Dusen, Jr.
Philadelphia, Pa.

FORMAL OPINION 323

(August 9, 1970)

A minimum fee schedule can never be mandatory, and a lawyer can never be subject to disciplinary action merely because he fails to follow a minimum fee schedule

Canon Interpreted: Professional Ethics 12

Code of Professional Responsibility:
EC 2-18, DR 2-106

Considerable confusion still appears to exist in the minds of many members of the Bar in regard to the effect to be given minimum fee schedules. This Committee has heretofore attempted to clarify this situation in its Formal Opinion 302 and Informal Opinion 585; but these opinions continue to be misinterpreted and even misquoted, with results which tend to negate the actual holdings of the opinions. Consequently the principles embodied in these opinions appear to be in need of restatement, and the recent adoption of the Code of Professional Responsibility, which in the Committee's view is in complete accord with those principles, affords an appropriate occasion for doing so.

The only direct reference to fee schedules in the Code is in EC 2-18 and is as follows:

"Suggested fee schedules and economic reports of state and local bar associations provide some guidance on the subject of reasonable fees."

The annotator of the Code has compared this language to the following quoted from Formal Opinion 302:

"[U]nder . . . [Canon 12], this Committee has consistently held that minimum fee schedules can only be suggested or recommended and can not be made obligatory."

This is and has always been the Committee's position, and in view of the language of the Code of Professional Responsibility it remains unchanged. On the other hand, the fee customarily charged in the locality for similar services has long been recognized as one element to be considered in determining a proper fee. It is specifically recognized as one of six such elements under Canon 12, and one of eight such elements under DR 2-106(B). Where the customary minimum charge is reflected in a fee schedule, clearly it is proper for a lawyer to take this into account along with other elements in fixing his fee.

Conversely, if a lawyer wantonly ignores the customary charges for similar services in his community in fixing his own fees, then he is failing to take into account one element which both Canon 12 and DR 2-106(B) say should be considered. Should it be established through extrinsic evidence that he is doing this for unethical purposes, then all of this evidence taken together may establish unethical conduct upon his part. It is not the function of this Committee to pass upon individual disciplinary cases, and certainly it could not undertake to do so except in the light of specific facts. But it is obvious that in any case it must be the overall pattern of behavior of the lawyer and not any one single element upon which the enforcing disciplinary body must act. In light of this, the Committee has no hesitancy in holding that mere failure to follow a minimum fee schedule, even when habitual, can not, standing alone and absent evidence of misconduct, afford a basis for disciplinary action. There are *too many* other elements to be considered (five under Canon 12, seven under DR 2-106) which might justify departure from the fee schedule.

This is the position which this Committee attempted to take in Formal Opinion 302 in the following language:

"the habitual charges of fees less than those established by a minimum fee schedule, or the charging of such fees without proper justification, may be evidence of unethical conduct." (Emphasis supplied)

The qualifying words in the above quotation were chosen with care. "May be" means "when taken in conjunction with other evidence of unethical conduct." "Evidence of" means "grounds upon which a disciplinary board could or could not find that unethical conduct exists." All of this the Committee attempted to explain in Informal Opinion 585, which is here quoted and reaffirmed:

"Where disciplinary action is necessary against an individual lawyer, this is normally initiated by his local bar association and effectuated through an appropriate proceeding in the courts. It seems incapable to the Committee that in an appropriate case evidence that the lawyer whose conduct is under scrutiny had habitually charged fees less than those suggested or recommended by a minimum fee schedule adopted by his local bar association under circumstances and upon the basis set forth above, or that he had charged such fees without justification, would be admissible as being material and relevant. The weight to be given such evidence and the conclusion to be drawn from it would of course be for the tribunal conducting the inquiry depending upon the circumstances of the individual case. It might be evidence of unethical conduct which, taken in context and along with other such evidence, would warrant a finding that one or more of the canons had been violated. On the other hand, it might not be. This is why the Committee, carefully choosing its language, held in Opinion 302 that such undercharging "may be evidence of unethical conduct." (Emphasis supplied)

With this rather extended discussion the Committee hopes that this matter will be laid to rest and that the practice on the part of certain state and local bar associations of suggesting that fee schedules are or can be mandatory and that disciplinary action will be taken merely for failing to follow them absent other evidence of misconduct will be abandoned once and for all.



ONE CENTER PLAZA, BOSTON, MASSACHUSETTS 02108 / (617) 523-4529

Frederick G. Fisher, Jr.
President

October 25, 1973

Senator John V. Tunney, Chairman
Subcommittee on Representation of Citizen Interests
United States Senate
Washington, D.C. 20510

Dear Senator Tunney:

Thank you for seeking my views on the complex subject of legal fees. I share your concern that adequate legal services be made available to the public at a reasonable cost to assure equal access to the judicial process.

Perhaps the most important development in recent years in this regard is the concept of prepaid legal services. As you know, such programs will permit persons to purchase protection, at a reasonable rate, that covers the cost of legal fees they might normally incur. In order to promote these plans, legislation should be enacted to permit employers to deduct from their federal tax return as a legitimate business expense their contributory payments to employee prepaid legal service benefit plans.

The Legal Services Program, sponsored by the Office of Economic Opportunity, has done excellent work in representing the indigent. However, in doing so it denies the client the right to select his or her own lawyer. Prepaid legal service plans can provide similar services while protecting a client's freedom of choice.

A federal tax deduction for legal fees, similar to that available now for medical expenses, would also reduce the burden of such cost on the public.

Legal fees must be adequate in light of economic realities if we are to assure the continued strength and growth of the private bar. Where government statutes or regulations provide legal fee subsidies, they should be reviewed to determine whether they are realistic under present economic conditions. An unrealistic fee schedule will provide little incentive to the bar to represent those persons such programs are designed to benefit.

Improving the public's access to legal assistance will also hopefully encourage preventive legal services. Persons now tend to use a lawyer only after a problem has arisen or a crisis has occurred. They tend not to seeking counseling to avoid problems

MASSACHUSETTS BAR ASSOCIATION

Senator John V. Tunney, Chairman
Subcommittee on Representation of Citizen Interests
October 25, 1973
Page 2

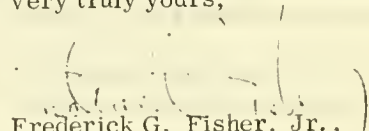
that may later require substantial legal expenses to resolve. Most prepaid legal service programs now in operation provide the insured with the right to consult with an attorney once or twice during the course of a year. The availability of such consultation without additional charge should result in the avoidance of some serious legal difficulties and the costs attendant thereto.

I trust you and your committee will agree that the more intelligent use of lawyers by the public may in fact result in reducing "catastrophic" legal expenses. Legislation should be encouraged to foster the development of prepaid legal service programs which prompt a more efficient use of lawyers at a cost that can be met by the average middle-income American family.

The present gap in services now seems to be most evident at that level. Prepaid legal service plans seem to be one program designed to meet the needs of these families.

If I can be of any further assistance during the course of your investigation, please let me know.

Very truly yours,


Frederick G. Fisher, Jr.,
President

STATE BAR OF MICHIGAN



306 TOWNSEND STREET

TELEPHONE (313) 372-9010

LANSING, MICHIGAN 48933

November 2, 1973

PRESIDENT
WALLACE D. RILEY
DETROIT

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BAY CITY

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DOUGLAS L. SWEET
COORDINATOR OF RESEARCH
AND DEVELOPMENT

PHILIP O. SPELMAN
DIRECTOR OF
COMMUNICATIONS

Hon. John V. Tunney, Chairman
Subcommittee on Representation of
Citizen Interests
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Senator Tunney:

I appreciate your invitation of October 15, 1973, for an expression of my views as President of the State Bar of Michigan concerning the subject of legal fees and their relationship to the general topic of legal representation in the settlement of grievances.

I should note at the outset that a joint concern between the Congress and the organized Bar for improving the availability of legal services to every citizen is not a new phenomenon. During the past decade, for example, the Bar has championed the creation of federally funded legal services programs and has vigorously opposed all attempts to interfere with their continued independence. The legislation presently pending in the U.S. Senate to create an independent legal services corporation is the latest manifestation of the leadership of the organized Bar in this area.

The profession is no recent convert to the cause of increasing the availability of legal services. Its concern for the public good has spanned the centuries and has been manifested by tangible expressions far outweighing those of any other business or profession. For example, the power of the courts to direct an attorney to undertake a particular cause has long been accepted by the Bar. The right to assigned counsel for those charged with crimes who cannot

Hon. John V. Tunney
November 2, 1973
Page Two

afford to retain their own lawyer has constantly been expanded through judicial decisions. Within the past two years, this right has been held to encompass all those charged with violations the penalty for which could involve incarceration.

For decades lawyers so assigned did so at their own expense. As the need for assigned counsel grew and the private practitioner could no longer bear the full expense, some measure of compensation was developed. Such remuneration is almost invariably governed by fee schedules which provide for token rather than realistic payment. Lawyers, consequently, continue to subsidize the administration of criminal justice.

The profession has also demonstrated a unique awareness of the rewards of public service in areas beyond the criminal law. Most observers generally acknowledge that the principal arena for social progress in the past 20 years has been the courts. Civil rights, environmental protection and consumer protection, are a few of the fields that come immediately to mind as those in which major developments have been obtained through litigation. Often the lawsuits which resulted in historic court decisions in these areas were instituted by lawyers representing clients who could either afford to pay nothing or far less than the lawyer could expect to receive if he devoted his talents to conventional private practice. These lawyers found far more reward in the causes they were representing than in the financial remuneration which was available.

The same interest in public service is responsible for the age-old phenomenon which finds lawyers at the center of government everywhere, serving their community, their state and their nation, mostly as volunteers without remuneration.

Hon. John V. Tunney
November 2, 1973
Page Three

We lawyers are, therefore, no strangers to the concerns of your committee. We welcome its participation in the quest for improving the administration of justice and pledge our cooperation.

There is a word of caution which in all candor should be mentioned. There are those who contend that the inability of some segments of the public to afford a lawyer in order to gain access to the administration of justice is or ought to be the personal responsibility of the lawyer and that the solution to this problem lies in compelling individual lawyers to represent those who cannot afford their fees at reduced rates, or, if necessary, for nothing. These advocates rely upon the historic cooperation of the Bar with the courts in accepting assigned cases. Thus, they would use the profession's unique sense of public responsibility to justify the placing of unparalleled burdens upon it.

The claim that responsibility for those who cannot afford services is exclusively that of the providers of that service is unique and finds no support in our history. We do not require the farmer, food processor or the retailer to charge less for his services when he deals with those too poor to afford to pay for food. We do not require the hospital or the nurse or the doctor to reduce their charges when treating patients who are unable to pay for medical treatment. We do not require the manufacturer or the retailer or the tailor to charge less when they are asked to clothe those who cannot pay for it. In each of these situations, government recognizes its responsibility to subsidize those unable to afford the goods or services involved, either by furnishing a direct subsidy or salaried government employees to provide the products and services.

These are legitimate functions of government for several reasons. First, it is the responsibility of the collective whole (government) to assist its weakest members (those unable to afford to pay for products and services). Second, in the long run it is in

Hon. John V. Tunney
November 2, 1973
Page Four

the national interest that providers of essential products and services be permitted to earn a fair return for their products and services regardless of the financial ability of the user so that they remain economically viable. Third, those in our society who are relatively less fortunate often have occasion to come into contact with government in a variety of small but meaningful ways and these contacts themselves demand their own expertise which somehow must be paid for if it is to remain available. Thus, for example, a lawyer specializing in helping the economically less privileged with their constant contacts with the bureaucracies of welfare, fair housing and anti-discrimination could not possibly survive if his income depended upon the fees which these clients could afford to pay him. Obviously, his availability to these clients depends upon some form of government subsidy.

Where then does the resolution of the very serious problem of the lack of availability of adequate legal representation lie? I suggest that it lies not in attempts by government to coerce the private practitioner but in a strengthening of the traditional cooperation between government and the profession to which I referred at the beginning of this letter.

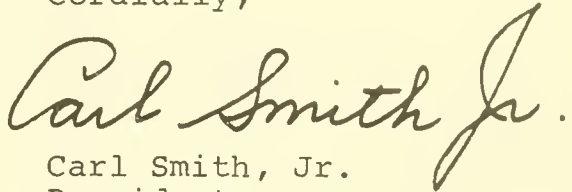
In addition to the traditional forms through which it has volunteered its services over past decades, the organized Bar is now developing programs to reduce cost and increase the public's ability to pay for legal services. Prepaid legal services, paraprofessionals, group practice, and videotape trials are all relatively new forms of the profession's historic concern for the public good.

These and other developments will undoubtedly most benefit the vast middle class which presently finds

Hon. John V. Tunney
November 2, 1973
Page Five

itself too poor to routinely afford quality legal representation but too rich to qualify for subsidized programs. Together with the strengthening and broadening of federally funded legal services programs, these efforts should carry us a long way down the road toward our mutual goal of providing every American with meaningful access to our legal system.

Cordially,

A handwritten signature in cursive script that reads "Carl Smith Jr." followed by a period.

Carl Smith, Jr.
President

CS/jsd

xc: Hon. Sam J. Ervin, Jr.
Hon. Birch Bay
Hon. Marlow W. Cook
Hon. Charles Mc C. Mathias, Jr.
Jane L. Frank, Chief Counsel and
Staff Director



Minnesota State Bar Association

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November 5, 1973

Honorable John V. Tunney
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Senator Tunney:

I respond to your letter of October 15 which dealt with the Judiciary Subcommittee on the Representation of Citizen Interests and its inquiry into the subject of legal fees. You asked for the views of the Minnesota State Bar Association by November 6. The best that could be done in this relatively short period of time was to convene the Executive Committee of the Board of Governors, which I have done, and solicit their views. What follows is of necessity my own statement made with a conscientious effort to reflect the views of the 5,000 members of the Association.

I begin by a brief reference to the number of new lawyers being admitted to practice law in Minnesota. Less than a month ago the Minnesota Supreme Court issued the attorney's oath to 383 new members, mostly recent Law School graduates. A substantially smaller number, less than 100, was admitted to practice law earlier in the year at a similar ceremony. The best evidence of the number of lawyers practicing law in Minnesota comes from the Supreme Court's records on those who have paid the annual attorney's registration fee, which is just over 5,000. Simple mathematics indicates that our numbers increased by almost 7.5% in the month of October.

Page Two
November 5, 1973

If one accepts the proposition that there are many citizens of Minnesota who feel they cannot afford a lawyer's services, one's immediate reaction would be that this new group might be the answer to their needs. However, each one of these new lawyers would immediately face the economic facts of life that it costs money to maintain a law office, whether they start on their own or go to work for someone else. Law simply can't be practiced in a vacuum but must carry on amidst the tools of the trade, which consist of office space, law books, secretarial expense and a whole host of other costs that the operator of any business has to face. My own experience would indicate that with every attempt to keep costs at a moderate level, the first \$10.00 to \$15.00 per hour that any lawyer earns is likely to go to pay this overhead. A great many of the citizens with whom I come in frequent contact don't feel they can afford to pay even \$10.00 to \$15.00 an hour for a lawyer's services. Therefore despite the best of efforts to help society solve its legal problems, substantial segments of our population will not be served even if the lawyer is willing to donate his time.

MINNESOTA STATE BAR ASSOCIATION LEGAL ASSISTANCE PROGRAMS

Despite the difficulties mentioned in the preceding program, the Minnesota State Bar Association has been exceedingly active in its efforts to extend legal services to the citizens of Minnesota not otherwise served. I will summarize these programs.

A. Legal Assistance of Minnesota (LAM)

LAM is a non-profit corporation which was formed in May of 1972 to initiate and supervise a true state-wide legal assistance program, with particular emphasis on the rural indigent not previously served. LAM's goal is to set up one district legal assistance corporation in each of twenty State Bar districts, which will set up local legal assistance offices. Clients served are primarily those on categorical assistance programs, though others are handled on the basis of need and income level. Basically the services rendered run the full gamut of civil legal services, excluding criminal cases, fee-generating cases, and those cases not otherwise provided for by law. LAM currently has four staffed office units operating in Minnesota, making a total of six districts covered by legal assistance to the indigent if the OEO sponsored Twin Cities projects are counted.

Page Three
November 5, 1973

LAM has considered and approved two other district proposals and is participating in planning in five other districts.

Funding is provided under a 3/4 matching grant between Department of Health, Education and Welfare Social Service funds and local funding sources. The Minnesota State Bar Association provides the local match for LAM, the state corporation, which offices in the State Bar Center. The State Bar Foundation has also set aside \$20,000 (\$1,000 per district) to be granted to and used by the district for local matching money.

Legal Assistance of Minnesota has assisted approximately 2,700 indigent persons to date.

B. Community Defender Organization of the District of Minnesota

The Community Defender Organization has been operating in Minnesota since July of 1972. Funded by the Judicial Conference of the United States, this organization provides the "public defender" function for the Federal Court District of Minnesota and is approved by that Court and by the Judicial Conference. Administered and staffed by an attorney, the organization makes use of a rotating panel of some of the best criminal lawyers in the state. During its first year of operation, these attorneys were appointed to represent 303 indigent clients, primarily in felony cases, but with some parole revocations, material witness hearings, and narcotics commitment hearings. Approximately 40 Minnesota lawyers are participating in this program at present.

C. Legal Assistance to Minnesota Prisoners (LAMP)

The LAMP Project was initiated in April of 1972 in conjunction with the University of Minnesota Law School Legal Aid Clinic to provide civil and institutional legal assistance to incarcerated indigent clients. Funded under a three-state LEAA grant for civil representation of prisoners, LAMP is directed by two attorneys and utilizes the developing skills of second and third year law students. Since the inception of legal services in July of 1972, LAMP has served over 1,000 clients in the three major state institutions and the Minneapolis Workhouse. The University Legal Aid Clinic also provides services to inmates at the Federal Correctional Institution at Sandstone. While the bulk of LAMP representation involves traditional civil and institutional proceedings, LAMP has also been instrumental in

Page Four
November 5, 1973

establishing the Inmates Council at Sillwater Prison, by civil suit has brought procedural due process in the state prison system closer to reality, has participated in parole revocation hearings, and has laid the groundwork for the use of para-legal personnel in parole revocation and institutional disciplinary hearings.

D. Retired Judges Services to the Poor

The Minnesota State Bar Association sponsored a Judicial Retirement Bill enacted by the state legislature during the 1973 session. Retired judges have always been prohibited from engaging in the practice of law. One of the provisions of this act permits and encourages retired judges to practice law without remuneration so as to provide legal advice and assistance to those otherwise unable to afford it.

E. Legal Services for the Poor by Law School Students

The Minnesota Supreme Court has adopted a rule which permits upper class Law School students to work under the supervision of practicing attorneys in handling both civil and criminal cases for the needy in court. Both the University of Minnesota Law School and the William Mitchell College of Law have clinical programs operating under this rule.

F. Legal Aid - Legal Reference

Our Bar Association has a statewide Legal Aid - Legal Reference service which is operated out of the State Bar Association Office and through the officers of the District Bar Associations. Legal Aid offices have operated for many years in the three largest cities in Minnesota. District Bar Associations have acted to provide legal services at low cost or without cost by a reference system to lawyers who have indicated a willingness to handle this type of case.

MINIMUM FEE SCHEDULE

The Minnesota State Bar Association adopted an advisory fee schedule for certain types of legal services a good many years ago. The inflationary trends of the last two decades coupled with failure to make regular revisions tended to make the recommended charges substantially below what many lawyers would actually charge. A study was made of the propriety of such a schedule in early 1972 in the light of litigation on the subject.

Page Five
November 5, 1973

In March of 1972 the Board of Governors suspended the schedule and in May of 1972 the schedule was abolished. Nothing has been devised as a substitute in this state. I am certain that the forces of competition in certain types of legal work, such as the handling of divorce cases where the court frequently sets the attorneys' fees, may produce certain similarities in charges from one law office to another in any given community. Generally I find a substantial difference from law firm to law firm in the communities with which I am familiar in the basis on which they charge for services.

FEE ARBITRATION COMMITTEES

With one or two exceptions, all of the District Bar Associations in this state have established Fee Arbitration Committees to handle disputes over fees between lawyer and client. These committees consist of one lawyer and two laymen. The decision of the Committee is not binding except that the parties can agree in advance that it will be binding if they so choose. If the parties don't agree that the decision is binding, the Committee offers to lend assistance by way of expert testimony in court, should the matter go that far.

PREPAID LEGAL PLANS

The State Bar Association has had an active Prepaid Legal Committee working on problems surrounding the various types of Prepaid Legal Plans. We are in the process of petitioning the Minnesota Supreme Court for a procedure whereby all such plans must be registered with that court. Rules and regulations covering such plans are also in the process of being drafted for submission to the Supreme Court. The Bar Association assisted in legislation adopted in the 1973 session of the state legislature to permit insurance companies to write prepaid legal insurance policies in the state of Minnesota. Policies may now be written to provide coverage for services which are neither accidental nor unforeseen, such as the writing of a Will. With the amendment of the Taft Hartley Act to permit labor organizations to bargain collectively for paying the cost of legal services as part of the fringe benefits of employment, our Bar Association believes that a giant step has been taken toward funding the cost of legal services for those who might not otherwise be able to pay for them.

Page Six
November 5, 1973

PERCENTAGE AND CONTINGENT FEES

Our Association has sponsored legislation at every recent session of the legislature to improve and simplify probate practice. For most of the 25 plus years that I have been a lawyer, lawyers in Minnesota charged for probate work on the basis of a percentage of the value of the estate. The 1971 session of the legislature adopted a statute providing that the value of the estate should not be the controlling factor in determining legal fees. Another bill pending before the legislature permits the setting up of a public office of probate counsel in each of our counties where the fees to be charged would be based on the costs of that office.

I am not at all certain that the statute mentioned above dealing with fees and the size of estates is entirely beneficial. Lawyers formerly expected to lose money on the smaller cases but could make it up on the larger estates, which could probably afford to pay the extra fee. Now it is my impression that smaller estates are being charged more because the fees tend to be determined with greater reference to the amount of time involved. The lawyers of this state have not found the answer to this problem but I am sure they all agree on one thing: Setting up of a public office to handle probate cases is universally opposed. Minnesota lawyers are generally of the opinion that the efficiency in the practice of law is not going to be promoted by turning over substantial areas of practice to the public sector.

Contingent and percentage fees have come in for attack in many areas of the practice of law. Much of the enthusiasm for no-fault auto insurance has come from references to the relatively small number of lawyers who have specialized in handling plaintiff's personal injury cases. Undoubtedly the legal profession deserves criticism for not having devised ways to place some restrictions on fees earned in personal injury cases. On the other hand, the finest of legal talent has been available to the most humble of our citizens in personal injury cases precisely because substantial fees are potentially available in handling their cases.

Many lawyers would have no particular objection to handling all cases on some sort of hourly basis. The keeping of time records among Minnesota lawyers on a systematic basis has become standard practice in this state during the past twenty years. However, most personal injury plaintiffs would be unable to hire a lawyer on a time basis, win, lose or draw. This of necessity introduces the contingency factor into the fee setting process.

Page Seven
November 5, 1973

There is nothing inherently bad about charging for fees on a percentage basis. Selling life insurance is a dignified calling. The basis of paying the agent is almost entirely based on commission. The same is true in the advertising business, the real estate business and in many other fields of endeavor. Percentages are used to determine earnings in such a wide spectrum of our economy that it is hardly fair to single out lawyers and forbid their fees being set in this way.

CONCLUSION:

The public image of the legal profession is not good. Some candidates can run for public office in this state and have gotten a lot of political mileage out of attacking lawyers. Nonetheless, the lawyers of this state will continue to be public spirited in their communities and will try to do a good job for their clients.

My great hope for the lawyers of this and future generations is that it will be possible for members of this profession to make a reasonably good living without being unduly beholden either to government or to big business, to big labor or to big anything else. Lawyers as a group must have the same freedom to attack injustice and dishonesty wherever it appears as do the members of the press. Such freedom will best be served if lawyers can continue to find it economic to practice in all sizes of firms, from the individual practitioner to the small law firm to the medium size law firm to the large metropolitan law firms. Every citizen should have access to competent legal representation. He should not have to fear either that his lawyer's bill will bankrupt him or that his lawyer's independent position is compromised.

Sincerely yours,

Gene W. Halverson, President
Minnesota State Bar Association

GH:ly



THE MONTANA BAR ASSOCIATION

PRESIDENT

HENRY LOBLE

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EXECUTIVE DIRECTOR
SECRETARY-TREASURER

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November 2, 1973

Honorable John V. Tunney
United States Senator
United States Senate Committee
on the Judiciary
Subcommittee on Representation of
Citizens' Interests
Washington, D.C. 20510

Dear Senator Tunney:

I have your letter of October 15, 1973, with enclosure containing your remarks as chairman of the Subcommittee on Representation of Citizens' Interests. I have delayed answering until such time as the members of our Board of Directors had an opportunity to comment thereon to me.

At the outset, I most respectfully suggest that some of the statements in your remarks do not appear to me to be susceptible of factual proof. An example is your initial sentence:

"More than 30,000 legal questions each day affecting Americans personally are not resolved because people cannot afford legal counsel."

I do not see how a determination could be made that there are that number of legal questions to be resolved each day, nor can I see how it can be determined that the people who don't have them resolved didn't do so because they couldn't afford legal counsel. Many, many persons who can well afford legal counsel simply do not consult attorneys because they don't care to spend the money, they don't like lawyers, it is too much trouble, or they simply delay until it is too late. Many questions could be resolved by legal counsel at a very modest fee which, when neglected, eventually result in massive legal problems which require a much larger fee.

Honorable John V. Tunney
November 2, 1973
Page 2

In a hearing such as yours, you are certain to have complaints from people who say they were overcharged, they can't afford lawyers, they weren't helped by lawyers, etc. Of necessity, you are going to hear the negative side. Those who saw lawyers and were well satisfied won't appear, nor will any steps be taken to see that they do appear. The result is that the version your subcommittee hears will not be a complete picture, nor will it be a true picture.

Many of the remarks you make are not applicable at all to the state of Montana. The citizens of this state do have access to lawyers at reasonable fees. It is, of course, true that the better the lawyer is, the more his services are in demand, and the more he charges for them. This is as true of lawyers as it is of any other kind of business. I am quite confident, however, that lawyer fees are, comparatively speaking, lower than medical fees. The difference between the medical profession and the legal profession is that methods have been devised for persons to pay medical fees more easily while little has been done in this area for legal fees. We are, in Montana, trying to do something to increase the deliverability of legal services. We are trying to devise methods and means whereby lawyers become more available to the public. One of our programs which is in the process of being implemented is a lawyers referral service. Under this plan, persons who do not have a lawyer may call the Montana Bar Association, on a toll-free number, and be referred to an attorney. They will be given an appointment, and the attorney will charge only \$10 for an appointment of one-half hour's duration. That is, I am sure you will concede, a very reasonable fee.

We are also working on a plan for group prepaid legal services whereby a person can join such a group (which operates somewhat similar to Blue Shield or Blue Cross), pay a premium, and then when he needs legal services, his fee, on an underwriting basis, is paid by the group. The plan may also operate on an insurance basis and we are looking into that as well. We hope to be able to establish a plan whereby a substantial number of interested persons in Montana will have prepaid legal services so that the impact of the cost of such services will be substantially reduced as far as the individual is concerned. On an underwriting basis, of course, the cost will be spread amongst the members of the group.

Honorable John V. Tunney
November 2, 1973
Page 3

You might be interested in knowing that the members of the Montana Bar Association have voluntarily assessed themselves to create a client security fund. This provides a fund for the reimbursement of clients who may have had their funds misappropriated by an attorney. I do not believe the members of any other profession voluntarily assess themselves for a similar purpose. Persons who have had such an unfortunate experience with a Montana lawyer may present claims against the fund and, if approved, receive reimbursement.

Consideration should be given by your subcommittee to the obvious fact that lawyers' fees, like everything else in inflationary times, must go up. The cost of typewriters, office furniture, secretaries, paper, office equipment of all kinds, and all overhead costs have risen substantially. The cost of our fees must also go up. There is no way to avoid this.

Lawyers generally receive at least seven years of college training. They are skilled professionals who are entitled to be well paid for their services. Why not? On the other hand, they are not entitled to excessive fees, and in Montana any lawyer who charges a clearly excessive fee violates our Code of Ethics and is subject to disciplinary action upon complaint of the client.

As far as contingent fees are concerned, there are many instances where clients could not procure any legal representation at all unless they could do so upon a contingent basis. To abolish contingent fee cases would be to deprive these people of legal counsel. Contingent fee cases are not nearly as profitable to lawyers as the public imagines.

You refer to contested veterans' claims where a lawyer can only receive a maximum of \$10 for representing the veteran. This effectively deprives the veteran of legal representation.

The Montana Bar Association has supported and will continue to support the legal services program for the poor established under the Economic Opportunities Act. It would be a serious mistake, however, to believe federal and state governments could satisfactorily provide legal services to the public by salaried public employees.

It is my understanding the federal government provides subsidization of medical fees for elderly people. A similar program could be considered, such as Judicare, where the federal

Honorable John V. Tunney
November 2, 1973
Page 4

government assists people financially to procure legal services. There is no more reason to suppose that lawyers will abuse such a program than to suppose that doctors will.

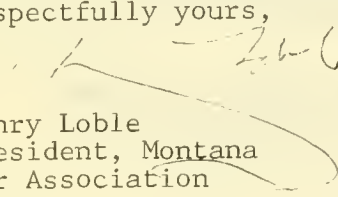
You referred to the concentration of lawyers in such places as Washington, D.C. and New York City. That is only natural. Those lawyers do not represent only the people who are in Washington, D.C., New York, and the immediate vicinity of those cities. The reason there are so many lawyers there is because there is a demand for their services on the part of people all over the United States. That is where the governmental heart and the financial heart of America is located. A similar situation on a smaller scale exists in Montana where there are more lawyers in Helena, the capitol city, on a proportionate basis, than there are in other communities in Montana. Again, the reason is that the lawyers in Helena represent people from all over the state of Montana because this is the state capitol, and many financial and governmental activities occur here.

I want to see quality legal representation made available to all people. That is what the members of the Bar Association in Montana want to see. However, I urge your committee not to become so enamored with criticizing lawyers that you destroy our present system just because the nation is presently upset with the Watergate lawyers. We are all disgusted by them. Yet, they are a miniscule number of the lawyers who are practicing in this country. Most lawyers are honest and able, with a commitment to their profession and a true desire to serve the public. We have a few rotten apples in our bin like every other occupation or profession. We are going to clean them out as fast as we can.

Please don't neglect to consider the many, many programs that are being considered and implemented by the various bar associations throughout this country, and the American Bar Association. Anything we can do to help your subcommittee we will be glad to do. You only have to call upon us.

Thank you for writing.

Respectfully yours,


Henry Loble
President, Montana
Bar Association

HL:kb

cc: Diana S. Dowling
Executive Director
Montana Bar Association

NEBRASKA STATE BAR ASSOCIATION



OFFICE OF THE PRESIDENT

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Omaha, Nebraska 68102

Telephone (402) 341-7400

October 30, 1973

The Honorable John V. Tunney
United States Senator
Senate Office Building
Washington, D.C. 20510

Dear Senator Tunney:

With respect to your Subcommittee hearing on the subject of legal fees, please be advised that Nebraska has an integrated bar, but we do not have a fee schedule that has been under criticism by the Department of Justice and other sources. At one time we had a unit program which suggested for certain types of legal work a certain number of units be charged, and each lawyer could and would fix his own charge per unit. But even that practice has been abandoned.

I do not feel we have the problems on legal fees and services that perhaps many of the other areas do. We have a very efficient Legal Aid Program for the poor and under-privileged people who by reason of low income qualify for the service. If their income is such that they do not qualify for the free Legal Aid, we have what is known as the Lawyer Referral Service. A person of moderate means and income can call the Lawyer Referral Service which is comprised of members of the Bar Association. They agree that they will grant an interview of up to an hour to the person requesting it for \$10.00. In most instances, so I am told, this is sufficient to solve the problem. If it is not, the person will then be told by the lawyer what the legal expense involved will be and how it can be paid.

There was some complaint in our area that these services were not known to the people who needed them. I therefore requested our TV stations to help us make them known. They very

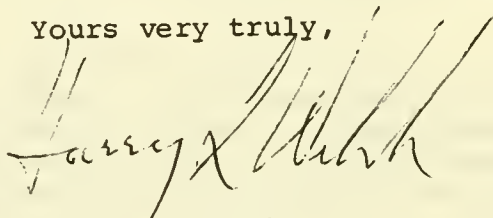
Hon. John V. Tunney
October 30, 1973
Page 2

graciously agreed, and I made a number of 30 and 60-second tapes on the availability of legal services, which were run periodically over the past several months and resulted in a marked increase in the use of these services.

With all of the foregoing this is not to say we do not receive complaints about excessive charges by our own local attorneys and complaints about the manner in which their services are rendered. These matters are always referred to the Chairman of the Disciplinary Committee who checks them out for the Bar Association.

I trust we have been of some help to your Committee, and if there is anything further needed, please do not hesitate to call on me.

Yours very truly,

A handwritten signature in dark ink, appearing to read "Harry L. Welch", with a large, sweeping flourish extending from the end of the name.

Harry L. Welch
President

HLW:JR



OHIO STATE BAR ASSOCIATION

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OFFICE OF THE PRESIDENT

WALTER A. PORTER
390 TALBOTT TOWER
DAYTON, OHIO 45402

November 5, 1973

Airmail
Special DeliveryHonorable John V. Tunney
Chairman, Subcommittee on Representation
of Citizen Interest
Senate Office Building
Washington, D. C. 20510

Dear Senator Tunney:

This is to acknowledge receipt of your letter of October 11, 1973, which arrived while I was out of the office on vacation. Due to time limitations, perhaps my reply will not do justice to the strong feeling held by most members of our Association, and all members of our Executive Committee that the hearings held by you are extremely important both to the organized Bar and to the public.

All lawyers are deeply concerned about the unconscionably high fees that are generated in some instances. This is particularly true of the fees generated in some of the black lung cases. This has caused much consternation and deserves the attention of everyone. By the same token, we are also concerned about the limitation on fees in certain areas which sometimes results in needy persons not securing proper representation. This is particularly true in certain Veterans Administration regulations that limit the legal fees to \$10.00.

We are also concerned about the consumers' problems such as the inability to secure counsel in housing matters, to remedy defects in workmanship in the construction of houses, automobiles, etc.

Perhaps I speak as a representative of an organization that has its own best interests at heart. I know that we sometimes receive this criticism. Be that as it may, I am firmly convinced that the organized Bar is moving forward on its own to attempt to meet these problems.

There are areas in which federal legislation is needed such as the black lung cases, Veterans Administration matters and any other

Honorable John V. Tunney

-2-

November 5, 1973

matters in which federal funds are directly involved. However, as a general principle, I hope that the states will be given the opportunity to meet these problems as has been urged by the Administration in the No-fault Insurance field.

As to No-fault Insurance, many states have adopted specific plans. Ohio is presently considering a no-fault insurance bill which has passed the House and will be considered by the Senate in early 1974. This is one of the many areas in which we are moving forward. I am firmly convinced that the problems of Ohio residents in the no-fault field are vastly different from the problems encountered in other states such as New Mexico, Alabama, New York and California.

The same reasoning attaches to consumers' problems. The Ohio State Bar Association has created a committee on "Individual Rights and Responsibilities." We are fully cognizant of the consumer complaints and are making every effort to meet and resolve them.

We have also given careful consideration to the regulation of legal fees in the real estate field and have taken a position on the Proxmire bill opposing federal intervention.

Our Association is also deeply concerned about representation of indigent persons. Seven years ago we created the Ohio State Legal Services Association and initially funded the organization. Thereafter, it secured its funding through OEO grants, which were supplemented by our Association. We worry about the Legal Services Corporation Bill, which, in its present form, would effectively destroy the Ohio State Legal Services program due to its impact upon backup centers. I have evidenced the concern of our Association in this respect by direct communication with Senators Taft and Saxbe.

Our Association is also directly involved in the prepaid legal services field and, as of July 1, 1973, we created the Ohio Legal Services Fund whose trustees are presently exploring the creation of an open panel plan for the benefit of all citizens of Ohio.

With regard to minimum fee schedules, our Association has never approved a minimum fee schedule. Many local Ohio bar associations, in the past, have adopted such a schedule. In light of recent developments in the Justice Department, I have recommended that all minimum fee schedules be abolished in Ohio and passed this recommendation on to all local associations.

As to settlement of grievances regarding fees, we are urging each local association to create an arbitration committee to resolve fee disputes. As you know, when a fee is unconscionable, there is direct violation of the Code of Professional Responsibility. These grievances are considered by the local and state ethics committees.

We have also instituted a statewide lawyer referral program which became effective July 1, 1973, to service those counties in our state who do not now have their own referral plans.

Honorable John V. Tunney

-3-

November 5, 1973

By the creation of these programs we in Ohio feel that we are making legal services available to all the people, both rich and poor.

The position of our Association is simply that, with the exception of those areas in which federal funds are directly involved, Ohio should be permitted to move forward without federal intervention to meet these problems of fees, and the continued provision of legal services to all people.

I, too, look forward to working with your committee. I am sorry that your letter arrived in my absence and that it did not come to my attention in time to respond adequately. I hope this letter is of some assistance to you and that it will be made a matter of record with your committee.

Sincerely yours,



Walter A. Porter

WAP:bb

cc: Mr. Joseph B. Miller

LAW OFFICES

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CHARLES B. BURR, II
BARTON A. HERTZBACH
ANDREW S. PRICE
ROBERT I. WHITELAW
ROBERT A. MACDONNELL

October 29, 1973

Honorable John V. Tunney
United States Senate
Washington, D.C. 20510

Dear Senator Tunney:

Please be advised that I am Chairman of the Pennsylvania Bar Association's Committee on Availability of Legal Services. Pennsylvania Bar President William M. Power of Doylestown, Pennsylvania wrote you on October 9 with respect to the activities of the Pennsylvania Bar and in particular our Committee's activities.

Our Committee's activities are addressed primarily to the question of increasing availability of legal services to people of moderate means. I am pleased to enclose herewith a copy of my Committee's Mid-Year Report to the Pennsylvania Bar Association so that you and your Committee can have some idea of the scope of our investigation into this middle income field. Our Committee is sincerely endeavoring to do something in this important field and I am sure our activities will be of interest to Congress.

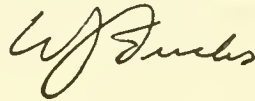
Please be advised that nothing contained in the Report of the Pennsylvania Bar Association Committee on Availability of Legal Services should be considered at this point the official policy of the Pennsylvania Bar Association. This is an informational report only. The Committee's activities to date have been purely exploratory. When we have completed a particular phase of our exploration, it would then be in order for us to make a recommendation for action to the Pennsylvania Bar Association Board of Governors and House of Delegates. At this point, I consider any specific recommendations will not occur until next year.

OBERMAYER, REBMANN, MAXWELL & HIPPEL

Honorable John V. Tunney
Page 2
October 29, 1973

I am also active in this field in the American Bar Association where I chair a Special Committee under the General Practice Section on the same subject. We are also working on this matter in the Philadelphia Bar Association where I chair the Committee on Services and Communications.

Very truly yours,

A handwritten signature in dark ink, appearing to read "W. M. Power", written in a cursive style.

WJF/mle
encl.

cc: William M. Power, Esq.,
President
Frederick H. Bolton, Esq.
Executive Director

PENNSYLVANIA BAR ASSOCIATION

REPORT OF COMMITTEE ON
AVAILABILITY OF LEGAL SERVICES

This Committee was newly created at the beginning of 1973 at the urging of the incoming President of the Pennsylvania Bar, William M. Power. The Committee's mission is to explore new concepts, methods and structures of law practice in order to improve the availability of legal services, especially to people of moderate means. The Committee has already held two very well attended meetings, the first at Hershey, Pennsylvania on April 7, 1973 (at the time the County Bar Presidents met) and the second at the headquarters of the Bucks County Bar Association in Doylestown on May 31, 1973 (the Bucks County Bar Association generously hosted this meeting). Including some excellent coffee, soft drinks and pastries provided by the Bucks County Bar Association at the second meeting, these meetings have been entirely without expense to the Pennsylvania Bar Association. The lawyers attending provided their own travel expenses and gave generously of their chargeable time on a normal work day. The Committee is enthusiastic over its role but realizes it is embarked on a very long range project.

The Committee is proceeding on the premise that the moderate income public comprises people with family incomes from \$5,000 to \$15,000 a year. This is, of course, flexible and may vary from community to community and may change from time to time in the future. The legal needs of persons under \$5,000 a year are hopefully taken care of by the poverty legal service programs, including the Federal Office of Economic Opportunity and other programs, some state and local programs, plus traditional legal aid performed by the private Bar as a public service. The needs of people over the \$15,000 level are ordinarily readily accommodated by the private Bar and these people can as a general rule, afford to pay normal fees.

The need for legal services by people of moderate means and the unfilled proportion thereof have not been scientifically established. The American Bar Association does have a special survey

project going on which is expected to be completed in two or three years, which will survey in depth legal needs. Nevertheless, and admitting that not all lawyers will agree with all of the following the Committee is proceeding upon the premises below:

1. There is probably a substantial unfilled need for legal services among people of moderate means.

2. This unfilled need may be very considerably different in urban areas as distinguished from non-urban areas.

3. The legal problems of the moderate income public probably fall into certain definite categories, for example - family troubles, real estate purchases, leases, collecting government benefits like Social Security, small accident cases, small inheritance situations, small collections, minor criminal matters. These are for the most part repetitious and relatively unexciting (at least they are unexciting and unstimulating to the brilliant young activists, many of whom have become engaged in the poverty law work and want to become involved in important class actions and law reform cases).

4. These moderate income people customarily do not take their legal work to lawyers because these potential clients (a) are ignorant of what a lawyer does; (b) are afraid they cannot pay the legal fees; (c) in general distrust lawyers as a class; (d) do not know any lawyers; (e) find it inconvenient to go to a lawyer's office; (f) psychologically are afraid to go to a lawyer--they won't confront their problems. Any one or several of the above factors may exist.

than the
^ 5. There is much legal work of a level lower ~~than the~~ private practicing Bar finds it ~~economic~~ to deal with. The Bar therefore avoids it. ✓

At the two meetings of the Committee, the Chairman outlined a series of approaches to the entire problem of providing more legal services to people of moderate means, which have been considered by the American Bar Association, some of which are presently under study by other committees of the Pennsylvania Bar Association, namely the following:

1. Pre-Paid Legal Service Plans. Fundamentally, these plans represent a method of funding the availability of legal services for people of moderate means as opposed to a new method of performing legal services. There is no doubt that the implementation of these plans is a worthwhile project, but this matter is already capably being handled by the Pennsylvania Bar Association Committee on Pre-Paid Legal Services Plans headed by J. Thomas Menaker of Dauphin County.

2. Certification of Specialists. Without passing upon the merits of this controversial idea, it is sufficient to note that this matter comes under the Pennsylvania Bar Association Committee on Specialization headed by Joseph T. Labrum, Jr. of Delaware County.

3. Expansion of traditional Lawyer Referral, including the "beefing up" of existing county Lawyer Referral facilities and the creation of new county facilities; possibly the creation of a state-wide service.

4. Creation of "Law Centers". This idea dovetails with the expansion of Lawyer Referral and will be commented upon in detail below.

5. Judicare-type programs for people of moderate means, patterned upon the Wisconsin experiment of Judicare.

6. Creation of Lawyer-to-Lawyer Consultation Panels, permitting general practitioners to consult readily with specialists in appropriate cases. There is a private plan in Cleveland, Ohio.

7. Creation of large area or national law firms.

8. Income Tax deductions for all legal services. This may be extremely controversial and the American Bar Association's General Practice Section presently has a Committee working on a proposal. The idea is not new but has been felt in the past to be politically not feasible.

9. Most of the discussions of the Committee and correspondence with the Chairman since the creation of the Committee at the beginning of 1973 has been devoted to the idea of creating "law

centers" for people of moderate means or in the alternative of vastly "beefing-up" the Lawyer Referral program.

The law center idea is somewhat controversial.

A law center would be set up by the local Bar Association to specialize in middle income law problems. The simple and lower level problems would be handled right at the law center and the more complex and substantial matters would be referred out to the private practicing Bar in traditional Lawyer Referral fashion. At the law center, middle income clients would be screened at a high production rate. The law center would utilize the specially trained "lawyer referral type" lawyers and para-professionals. There would be wide spread use of check lists, forms and all manner of devices of law office efficiency which would reduce costs and produce the delivery of simple legal services in the most inexpensive and efficient manner. Clients would be obtained by a substantial advertising and public relations effort, strictly under Bar Association and therefore ethical control. At the law center the Bar Association itself would establish guidelines and thresholds. Certain kinds of cases, after preliminary analysis and advice at the law center by the Lawyer Referral officer or his or her para-professional assistant acting under his or her direct supervision, would be immediately referred out to the private practicing Bar on a regular Lawyer Referral basis. For example, plaintiffs' negligence claims of substance, decedent's estates, major criminal matters all would be referred out. Other cases which cannot be disposed of with a relatively small expenditure of time would also be referred out to the private Bar. If the need was non-legal, the member of the public would be referred to some other public or private office, such as for example, the local Social Security office, Alcoholics' Anonymous Headquarters, etc. But matters which by their nature require only a small amount of legal time to be involved or would be uneconomical for the private Bar to handle would actually be handled by the lawyers and para-professionals at the law center. These might include for example, minor traffic violations, small commercial claims, landlord complaints, Social Security Benefits, etc.

The Committee at its meetings was substantially in agreement that there is a significant unfilled need for legal services among people of moderate means; that Lawyer Referral efforts should be

"beefed up"; that this unfilled need would surface and go either to the Lawyer Referral office or the law center if the Bar Association engaged in stepped-up advertising and other public relations efforts; but the Committee was not at all in agreement as to whether the solution is to create law centers which in fact, perform some lower level legal work beyond the preliminary analysis and screening of incoming cases. There seems to be more sympathy for the law center idea in the large cities and less in the smaller county seats. The county seat lawyers feel the needs of the public can be filled through an expansion of traditional Lawyer Referral. There is some obvious concern that the law center would compete with the private practitioner.

The law center concept does endeavor to accommodate the difference between the large urban center and the small town. It is thought that the Bar Association itself will fix the threshold i.e. the point at which a legal matter will be referred out to the private practicing Bar on a traditional Lawyer Referral basis. In the large city this threshold might be fairly high so that the law center or branch law centers in the city might be handling quite a volume of lower level matters. After all, in the city, with its high concentration of population, there might well be a very large volume of these matters which could be handled on a streamlined basis. In the small country town, however, the threshold might be set much lower or might for practical purposes be at zero, so that in the small country town you would merely have a strong, well-organized traditional system of Lawyer Referral. In the completely rural areas there could well be no Lawyer Referral office but instead the availability of a statewide "Watts" telephone line so that the Pennsylvania Bar Association Headquarters could act as the Lawyer Referral office for potential clients in these areas.

A fairly typical reaction to the law center idea from lawyers is that the creation of law centers will take away practice from the existing lawyers. It is pointed out that if the idea is successfully carried out, a substantial unfilled need for legal services should surface, only part of which will be handled at the law center. Therefore, it is hoped that the private Bar will have more practice and not less, if law centers are created. In any event, and most importantly the public will be better served.

An important stumbling block in the creation of law centers or the enlarging of Lawyer Referral activities is the matter of financing. Obviously, if the Bar Association is going to engage in substantially increased advertising and public relations work and if new clients are going to stream into the law centers or Lawyer Referral offices, funds will have to be provided to pay for the advertising, public relations work and the increased staffing. For example, an experimental plan is presently being considered in Philadelphia involving an annual budget of nearly \$100,000 a year with but two law center offices. It is hoped to expand this to at least five or six which will increase the cost. Of course, the more law services which are performed at the law center, the more personnel that are needed and hence the cost goes up. Even in a small county seat, however, which decides only to "beef-up" its Lawyer Referral service rather than create a law center performing lower level legal work, funds will be needed.

Several sources suggest themselves. First, all lawyers on the Lawyer Referral panel can pay an annual registration fee. This is a prevalent practice now across the country in Lawyer Referral systems. Second, lawyers on the panel to whom cases are referred can pay back to the Bar Association a share of the final fee, for example, 5 or 10 percent. This idea is not a new one traditionally and it is believed no ethical problem will be involved because the lawyer paying back a portion of his fee to the Bar Association is merely paying for the participation of the Bar Association in processing the incoming client during the screening process in the first place. Next, the law center will charge modest fees for actual legal services performed, but "seed money" will be necessary from somewhere to "start up" a law center. Another possibility of financing is subsidization of the law center by the Government. This idea is traditionally offensive to the private practicing lawyer but times are changing. Legislation sponsored by both political parties which has been before Congress in the last several years, including President Nixon's own Bill recently presented to Congress, for the extension of the OEO Poverty Law Programs has included provisions for a partial subsidy by the Government for legal services above the poverty level. It is suggested that the private Bar would vastly prefer that this subsidy, if it is enacted, be in the form of Judicare, where the private lawyer performs the legal services and received a portion of his fee from the Government, than for the Government staff lawyers to service the clients in the first place

and the Government charge the client direct a partial fee for the service with the balance subsidized by the Government. The Pennsylvania lawyers should realize that "it is later than you think". These Government programs are on their way and the Government may end up handling middle income clients if the private Bar cannot structure itself to do do.

Regardless of what the Pennsylvania Bar Association does with the law center concept, the committee was unanimously agreed that Lawyer Referral efforts throughout the Commonwealth should be expanded. The Committee is considering a survey of all Lawyer Referral activities in the state and later dissemination of information to the entire Commonwealth for the benefit of all county bar associations.

The Committee will meet again at the Homestead Meeting in Virginia on July 12, 1973. There not being time to circularize this report to the entire Committee the Chairman makes it over his own signature and will afford any member of the Committee an opportunity to comment or dissent.

Respectfully submitted,

WILLIAM J. FUCHS, Chairman
Committee on Availability of
Legal Services

STATEMENT OF THE STATE BAR OF TEXAS
TO
SUBCOMMITTEE ON REPRESENTATION OF CITIZENS' INTEREST
OF THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

BY LEROY JEFFERS, PRESIDENT, STATE BAR OF TEXAS

NOVEMBER 6, 1973

STATEMENT OF THE STATE BAR OF TEXAS
MADE BY LEROY JEFFERS, PRESIDENT

The deep concern of the lawyers of Texas in the ready availability of competent legal services to all of our citizens was often expressed and acted upon through the State Bar of Texas long before the creation of this Honorable Subcommittee. The State Bar of Texas is a statutory bar and declared by law to be an agency of the Judicial Department of the State of Texas of which all licensed Texas lawyers are members. With approximately 24,000 members, it is now the second largest state bar organization in the United States. It is governed by a thirty-member Board of Directors popularly elected by secret written ballots by the lawyers of their respective districts and by officers popularly elected by the lawyers of the entire State.

Lawyer Referral Services

The Texas Bar has long been committed and active in the development and operation of local Lawyer Referral Service offices "to assist the general public by providing a way in which any person who can afford to pay a reasonable fee for legal services may be referred to a qualified member of the Bar." Lawyer Referral Service offices have been established and are in operation in areas of less than 100,000 population

such as Abilene; in areas of from 100,000 to 300,000 population such as Austin, Corpus Christi, Fort Worth, Galveston and Waco; in areas from 300,000 to 500,000 population such as El Paso; in areas of from 500,000 to 1,000,000 population such as San Antonio; and in areas of more than 1,000,000 population such as Dallas and Houston. In accordance with approved and recognized principles (ABA Lawyer Referral Service 1) each of these local Lawyer Referral Service offices is "sponsored, authorized, and supervised by a local bar association, assisted by a State Bar Committee." The State Bar of Texas has encouraged and promoted the development of these local Lawyer Referral Service offices pursuant to the principle: "It is the duty of state and local bar associations to establish and to maintain some form of Lawyer Referral Service in every community, regardless of geographical area or population, if there are a sufficient number of lawyers in that community." Further, in each instance "the initial cost of establishing The Service was provided by the local sponsoring bar association." In each instance: "The service is operated in a spirit of public cooperation. Its office is readily accessible to the public. Its personnel has been impressed with the need to operate

The Service in a spirit of friendliness and public service bearing always in mind that The Service exists primarily for the benefit of the public rather than for the benefit of its lawyer members." ABA LRS Standards and Practices 1.

Each local Lawyer Referral Service operates with approved panels of lawyers willing to accept referral of clients on designated matters on the basis of the principles and rules laid down by The Service. In each instance The Service has a central office usually in conjunction with the local bar association office which any citizen may call to obtain a referral to an approved lawyer on the panel. In some of the smaller towns in Texas such as Sherman, McAllen, Hillsboro, Victoria and Laredo, The Service is operated by a local bar committee instead of through a central bar office. The number of localities in which Lawyer Referral Service offices or functioning committees are established is increasing rapidly. This public service program to bring lawyers and legal services closer to the people has been steadily underway and has experienced advancement and growth without remission since at least the early 1950s.

The State Bar of Texas as a state body now has adopted a proposal to make its Lawyer Referral Service Committee a

standing committee charged with the establishment and implementing the operation of a state office or system to provide Lawyer Referral Services in those communities not covered by a local service.

Generally, fairly wide publicity has been given to the existence of The Service, as to how it operates and the service that it renders, and as to the office number and telephone number where a contact may be made for a referral. Considerable public radio and television time has been made available in the various localities for publicizing The Service. Newspapers and other publications have been utilized along with pamphlets and direct communications with labor unions and like organizations.

Lawyer Referral Service offices operate in close cooperation with local OEO Legal Service offices engaged in providing legal services to those who qualify as indigents. Those not qualifying and who either have a potentially fee generating matter or show themselves qualified to pay a fee are channeled to the Lawyer Referral Service office for referral to an attorney if they have no lawyer of their own choice. The close collaboration is demonstrated by the fact that in Houston the Lawyer Referral Service has for some

years been operated by and in the same offices with Houston Legal Foundation which administers the OEO Legal Services program for the indigent in Houston and Harris County. The claim that legal services are not available to the great middle mass of the people who are neither affluent nor indigent because such services are too expensive is simply not true when the citizen goes through a Lawyer Referral Service office in Texas. Nominal fees of \$5.00 to \$10.00 are charged for initial interviews of thirty minutes or one hour and in a very high percentage of cases the legal service required is counsel and advice which can be given and the matter finally disposed of at the initial interview. Where continuing services are required, the LRS lawyer at the initial interview establishes by agreement the arrangement for the amount of and the payment of the fee for future services taking into account whether the matter is a fee generating matter, where a contingent fee would be applicable, or the attorney's fee could be recovered from an adverse party, and further taking into account the circumstances of the individual client and that person's ability to pay. Fee complaints concerning LRS lawyers have been minimal indeed.

Data from all of the approximately 300 Lawyer Referral

Services in the United States indicate the effectiveness of LRS in making legal services available to all of the people by reason of the steadily increasing ratio of referrals per population. By 1967 the Fort Worth - Tarrant County Bar Association in Texas had achieved the best ratio in the nation with a record of 100 referrals per 10,000 population. July-October 1968 ABA Lawyer Referral Bulletin 17. The figures on the increasing ratio of referrals generally are impressive when it is borne in mind that the Lawyer Referral Service is simply supplementary to the usual method of direct lawyer contact with an attorney of the client's individual choice.

While the stimulus provided by the hearings being conducted by this Honorable Subcommittee will hopefully be constructive and wholesome, the organized bars were in fact already keenly aware of the need for ever increasing availability of legal services to all of our population on an economically feasible basis and these legal organizations including the State and local bar associations in Texas have long been about but have grown increasingly vigorous in advancing this availability both through legal aid offices and OEO Legal Service offices for the indigent and Lawyer

Referral Service offices for the great majority who are neither indigent nor affluent but who may not have individual lawyers.

The commitment of the State Bar of Texas to the ready availability of competent legal services to all of its citizens is embodied in the very first statement in Canon 1 of the Texas Code of Professional Responsibility:

"A basic tenet of of the professional responsibility of lawyers is that every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence."

This declaration of professional duty to the public is expanded upon in Canon 2 as follows:

"A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available. The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel. Hence, important functions of the legal profession are to educate laymen to recognize their legal problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available."

Specific commitment to making legal services available through Lawyer Referral Services offices is contained in Canon 2-15 as follows:

"The legal profession has developed lawyer referral systems designed to aid individuals who are able to pay fees but need assistance in locating lawyers competent to handle their particular problems. Use of a lawyer referral system enables a layman to avoid an uninformed selection of a lawyer because such a system makes possible the employment of competent lawyers who have indicated an interest in the subject matter involved. Lawyers should support the principle of lawyer referral systems and should encourage the evolution of other ethical plans which aid in the selection of qualified counsel."

The professional duty of the legal profession to carry on public information and education programs for the benefit of the citizens is firmly asserted in Canon 2-2 as follows:

"The legal profession should assist laymen to recognize legal problems because such problems may not be self-revealing and often are not timely noticed. Therefore, lawyers acting under proper auspices should encourage and participate in educational and public relations programs concerning our legal system with particular reference to legal problems that frequently arise. Such educational programs should be motivated by a desire to benefit the public rather than to obtain publicity or employment for particular lawyers. Examples of permissible activities include preparation of institutional advertisements and professional articles for lay publications and participation in seminars, lectures, and civic programs."

This charge to carry out a professional duty has been no pious platitude with the State Bar of Texas. It has been

implemented for the past three years by an extensive and wide-ranging public affairs program utilizing all of the media in seeking to inform the public more fully of the needs for and the availability of legal services. On this program of institutional advertising and public affairs activity, the State Bar of Texas has annually expended \$200,000. Much public service television and radio time has become available. It has been fully utilized in developing the theme "If You Don't Know the Law, Be Sure You Know a Lawyer." The follow-up on this public information program has been the extensive publicizing of available Lawyer Referral Service offices through which the citizen who does not know one can come to "know a lawyer."

State Bar Town Halls

The Public Affairs program of the State Bar of Texas has now taken a new and exciting direction. There has just been initiated and is now underway a program of State Bar Town Halls under which highly qualified Texas lawyers will appear at various localities throughout the State in pre-sending public service type Town Hall programs of information and education on legal matters directly and intimately affecting the daily lives of the people. It is a program to bring live flesh and blood Texas lawyers into direct

contact with great numbers of Texas people in panel, open forum type programs. The pilot program was conducted with resounding success at El Paso on the recent evening of Wednesday, October 24, at which a panel of highly qualified Texas lawyers presented information and answered questions from a packed auditorium of people concerning certain new laws recently enacted by the Texas Legislature. The presentations included coverage of new drug laws, a newly revised Family Code, questions concerning the status of 18-year-olds who have been granted their legal majority, and questions under and the application of a new Texas Consumer Protection Code. The citizens greeted this program avidly and enthusiastically with an avalanche of questions. The media gave the meeting wide coverage. Under the impetus of this spectacular success, the Town Hall program will be carried into numerous other Texas communities as a permanent part of the public service program of the State Bar of Texas.

The State Bar of Texas in Canon 2-24 recognizes that: "Even a person of moderate means may be unable to pay a reasonable fee which is large because of the complexity, novelty, or difficulty of the problem or similar factors." Under these circumstances, it is declared in Canon 2-16:

"Nevertheless, persons unable to pay all or a portion of a reasonable fee should be able to obtain legal services, and lawyers should support and participate in ethical activities designed to achieve that objective."

The State Bar of Texas squarely recognizes the inescapability of the lawyer's duty to see that legal services are not denied to any citizen because of inability to pay a reasonable fee. The lawyer's obligation is stated in Canon 2-25 as follows:

"Historically, the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointments on behalf of such individuals. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional work load, should find the time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need. Thus, it has been necessary for the profession to institute additional programs to provide legal services. Accordingly, legal aid offices, Lawyer Referral offices, and other related programs have been developed, and others will be developed, by the profession. Every lawyer should support all proper efforts to meet this need for legal services."

Group and Prepaid Legal Insurance

The latest program of the Bar to advance and improve the availability of legal services is the development and initiation of new programs of group and prepaid legal insurance under which the legal health of citizens is protected by prepaid insurance or group programs comparable to the care now generally provided for the physical health of citizens through individual or group medical and hospital plans such as Blue Cross and Blue Shield. This is a vast new field in which pioneering is underway. The State Bar of Texas has sponsored and secured the enactment of legislation authorizing four pilot programs of group prepaid legal insurance in Texas. A separate corporation has been chartered by the Bar to implement the plan. It has further given active support to the passage of federal legislation which now authorizes a labor organization to engage in collective bargaining with employers for the provision of legal insurance as a fringe benefit. A vast new area is being opened up that will enable millions of middle income citizens to provide for the availability of a lawyer for their legal service needs by advance payments in an insurance program by them or by their employers. The organized bars, including the State Bar of Texas, have been vigilant and are moving purposefully on this entire front.

It is the deep conviction and the firm policy commitment of the State Bar of Texas that group legal service programs must preserve the freedom of choice of the individual client to select his own lawyer. It therefore strongly favors preserving the "open panel" requirement on group legal services and prohibiting "closed panel" arrangements which could be exploited by individual practitioners by requiring all of the participants in a particular group legal services program to obtain their legal services from an individual lawyer or an individual law firm. This is in accordance with the requirements of the Code of Professional Responsibility as adopted by the American Bar Association and the bar associations of the various states, including the State Bar of Texas. There are those including the ABA Committee on Availability of Legal Services, known as the McAlpin Committee, which "would sanction a non-profit organization that has as its sole purpose the furnishing of legal services to members of the organization." The argument for this position is that closed panels are constitutionally protected and that "a group legal practice under contract on a prepaid basis has an excellent opportunity to emphasize preventive law." It is asserted that:

"By preventive checkup the group legal practitioner has an opportunity to spot problems before they become catastrophic and thus, in many instances, solve them before protracted court action becomes necessary." 61 Illinois Bar Journal 134, 138; 63 Colum. L. Rev. 973 (1964); 55 A.B.A.J. 534 (1969); 48 Tex. L. Rev. 285 (1970).

The commentator cited in Illinois Bar Journal and Texas Law Review alike agree that Canon 2 as quoted above "is a near-radical departure from familiar ethical principles; its axiomatic statement that the legal profession has an affirmative 'duty to make legal counsel available' to the general public, with its corollary that a lawyer has a duty to assist the profession in fulfilling its duty, is new to the legal profession."

One thing that is clear is that whether it proceeds on the open panel path or by the closed panel route, or by both, the legal profession is definitely on its way toward making legal services more widely and economically available to the great body of middle income citizens through group and prepaid legal insurance programs. Other innovative and provocative proposals for expanding availability of legal services to middle income persons at lesser costs include the proposal for the development of law offices for middle income clients that utilize paralegal personnel, standardization, specialization and

not only has the demand for legal services been increased under the Shreveport Plan but "it appears that costs of legal services to the individual have been effectively reduced under the Shreveport Plan" by the pursuit of "the insurance principle of spreading the risk of legal catastrophe over the members of the group." This Honorable Subcommittee may be assured that the State Bar of Texas and the other organized bars in the nation have not been and will not be dilatory or docile in forging forcefully ahead in these programs for the betterment of the profession and the service of the public.

This statement does not deal with public interest law firms and pro bono programs such as sponsored by the ABA Special Committee on Pro Bono Publico Activities because the pro bono publico area is primarily one of legal services for what are deemed to be public interest causes or law reform causes rather than ministering unto the personal legal needs of individual men and women. We are proceeding on the assumption that it is the latter in which this Honorable Subcommittee is primarily interested and indeed about which the State Bar of Texas is primarily concerned. See Volume 11, September 1973 Pro Bono Report.

development of volume as means of extending legal services particularly in preventive law to more persons at more moderate rates. 40 California State Bar Journal 720.

Under the Shreveport Plan currently operating in Shreveport, Louisiana successful experimentation is occurring with "the first pilot prepaid legal service, open panel, free choice plan sponsored by the ABA and funded in part by the ABA, and American Bar Endowment and the Ford Foundation."

It has been provocatively suggested that the task of the organized bar is to secure adequate regulation of private, closed panel prepaid group plans operated for profit and to develop bar sponsored open panel, free choice type plans as an effective alternative. 61 Illinois Bar Journal 536 (1973). There is even encouragement for increasing the number of practicing lawyers despite the law student explosion in recent years. 10 Hawaii Bar Journal 30 (1973).

While there does not appear actually to be any empirical data that middle income people do not generally have legal services readily available at prices they can afford to pay, group legal plans and other innovative, creative approaches are being vigorously pushed by organized bars in the area of experimentation. And it does appear that

Minimum Fee Schedules

Much of the testimony presented before the Subcommittee seems to have been aimed at an attack on bar association minimum fee schedules. Actually, this area is at most peripheral and remotely relevant to the Subcommittee's prime concern with adequate representation of individual citizens through available legal services which are economically feasible. Practical experience teaches that the effect of minimum fee schedules has been to stabilize and hold down the cost of legal services during the inflationary price spiral of the past several years rather than the reverse. In any event, minimum fee schedules constitute nothing more than an informational guide on the reasonable value or the fee generally prevailing for a certain legal service for which the individual client is able to pay. Various individual horror stories have been brought before the Subcommittee, but those who are really knowledgeable readily recognize them as aberrant and atypical. The Subcommittee may be assured that striking down or bringing about the withdrawal or abandonment of minimum fee schedules is a development which promises no dividends for the middle income citizen. The validity and legality of minimum fee

schedules is of course an issue to be determined in a judicial and not a congressional forum. The State Bar of Texas if necessary will face that issue with confidence in the proper forum.

The State Bar of Texas Minimum Fee Schedule is headed with the caveat that:

"It should be at all times made clear that minimum fee schedules constitute suggestions only as to fees that have generally been found reasonable for particular services. It must be emphasized that such minimum fee schedules are not to be agreed upon and that they are not enforceable. It should be stressed that no attempt will be made to enforce them by disciplinary action, coercion, threats or otherwise. It should also be pointed out that failure to comply with minimum fee schedules does not constitute any violation of the canons of ethics. This statement is in accord with the views expressed by the Antitrust Division of the United States Department of Justice."

The governing principle of the determination of attorneys' fees in Texas is clearly asserted in Canon 2-17 and 18 as follows:

"EC 2-17. The determination of a proper fee requires consideration of the interests of both client and lawyer. A lawyer should not charge more than a reasonable fee, for excessive cost of legal service would deter laymen from utilizing the legal system in protection of their rights. Furthermore, an excessive charge abuses the professional

relationship between lawyer and client. On the other hand, adequate compensation is necessary in order to enable the lawyer to serve his client effectively and to preserve the integrity and independence of the profession.

EC 2-18. The determination of the reasonableness of a fee requires consideration of all relevant circumstances, including those stated in the Disciplinary Rules. The fees of a lawyer will vary according to many factors, including the time required, his experience, ability, and reputation, the nature of the employment, the responsibility involved, and the results obtained. Suggested fee schedules and economic reports of state and local bar associations provide some guidance on the subject of reasonable fees. * * * *

The last sentence quoted emphasizes and evidences the actual fact that suggested fee schedules do nothing more than provide "some guidance" along with the other factors to be considered in determining the reasonableness of a fee for a particular client under particular circumstances. Making minimum fee schedules a major issue before this Honorable Subcommittee can be nothing more than diversionary from the central interest in fully available and adequate legal services which are reasonably procurable. The merits of minimum fee schedules are in fact easily established.

58 ABA Jour. 31 (1972). It would not be fruitful to pause here to develop the patent justifications for the minimum

fee schedule in detail. The subject will not be dropped, however, until commenting that it is more than slight irony that generally the advocates of striking down minimum fee schedules are the same voices raised in favor of congressional action providing for the fixing of a wide range of maximum attorneys' fees by fiat of a federal beaurocracy. See S. 2288 by Proxmire and S. 2228 by Brock.

Conclusion

The Watergate climate in Washington has tempted more than a few enemies of the Bar to engage in a lawyer's witch hunt. The American lawyer has been more than once depicted by Madison Avenue techniques as a greedy money monger interested only in grubby profits and callous of social conscience. In all of the clamor about attorney's fees in the propaganda for federal no-fault automobile insurance legislation, it was never revealed that the facts show the truth to be:

"Insurance agents take more in sales commissions than lawyers do in fees. Doctors take more of the premium dollar than lawyers. Automobile repairmen take far more of the insurance dollar than lawyers do." Spangenberg, Trial (September-October 1972).

All reliable statistical data establish that lawyers as a

profession are not bloated with fabulous fees. IRS statistical data contained in Statistics of Income revealed a 1962 gross income of sole practitioners averaging \$15,000 per year with a majority of them earning less than \$10,000 income per year. Further significant is the fact that 83% of the law partnerships in the United States are in the two and three-partner category and that only 404 firms have ten or more partners. In other words, "there is no doubt about the overwhelming preponderance of small firms." Smith & Clifton, 52 ABA J. 1043 (1966). An American Bar Association survey in a later year established the median annual income of the American lawyer at \$21,260.00. 56 ABA J. 1164 (1970).

The basic position of the American lawyer is stated in Canon 2-16 as follows:

"The legal profession cannot remain a viable force in fulfilling its role in our society unless its members receive adequate compensation for services rendered, and reasonable fees should be charged in appropriate cases to clients able to pay them."

The American Bar is really the only force in our national life that is daily engaged in unswerving pursuit of providing legal services nevertheless to those persons unable to pay all or a portion of a reasonable fee. The more than 300,000 American lawyers whose ranks are being swelled at a dramatically rising

rate make up a great public service profession with treasured traditions and a noble heritage. They in general are not engaged in the blind pursuit of profit but in rendering skilled professional legal service to clients, community and country in their law offices and in the courts. Approximately 90% of all controversies are settled and disposed of by adjudication in law offices with only about 10% remaining for the courts. The American law office is a public service institution which can best fulfill its honored and responsible role with its traditional freedom unregimented and unregulated by federal beaurocracy.

The American Bar alone is possessed with the motivation and the expertise to bring increasingly the fullest measure of adequate and competent legal services to the great body of the citizens of Middle America at the most reasonable cost. It alone is qualified to elevate the caliber and quality of its services and to discipline and regulate its membership. It is busily about this task through the national bar and through state and local bars in every part of the land. It should not be impeded in the pursuit of its high goals by vilification, harrassment or punitive regulation and control.

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THE STATE BAR OF SOUTH DAKOTA

BOARD OF BAR COMMISSIONERS

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November 2, 1973

Honorable John V. Tunney
 Chairman
 Sub-Committee on Representation of Citizen Interest
 Committee on the Judiciary, U.S. Senate
 Washington, D.C. 20512

Dear Senator;

This is in response to your letter request of October 11. I have read your letter and its enclosure with great interest. It is difficult to make a significant contribution in this manner, but I shall do my best.

I have learned since assuming the Presidency of the South Dakota State Bar in June of this year, that there is a fairly steady criticism of lawyers that reaches the desk of the President of a Bar Association. These letters relate to various things, complaints over lawyer charges, failure to get work done by the time the Client thinks it should be done, a lawyers refusal to take a case, the rare allegation of dishonesty by a lawyer. Every such complaint is referred to an appropriate representative individual or committee of the South Dakota Bar for investigation. Nearly every time it is found that the complaint arises through misunderstanding. When an understanding is reached on the part of the member of the public who has been dissatisfied that is the end of the matter. This does not mean that lawyers are not wrong on occasion in their dealings with members of the public. However, the instances of lawyer impropriety are in my experience and judgment exceedingly rare, considering the lawyers exposure to the public and the circumstances of tension and emotion that often surround that exposure.

Your remarks to the Sub-Committee opened with the comment that more then 30,000 legal questions each day affecting Americans personally are not resolved because people cannot afford legal counsel. I do not know the source of this statistic but assume it has some validity or you would not use it. It obviously

Honorable John V. Tunney

Page Two

represents a situation that should be remedied. May I suggest to you that if the three hundred fifty thousand lawyers are each answering only ten client questions per day, more than ninety per cent of the questions are being answered. Let us not impose controls or regulations on a system that is serving the public as well as the present system is unless we are sure that we have something better to offer. From my own knowledge I simply do not believe that South Dakotans are going without legal counsel because of their inability to afford counsel in such matters as selling or buying a house or probating a Will.

I am proud of the legal profession. I am particularly proud of my professional brothers in South Dakota. They are hard working and conscientious community leaders. They are working long hours and employing every resource available to them to serve the needs of Clients. They are honorable and ethical. They are respecters and defenders of the Constitution and all Laws thereunder and devoted to perserving the rights that result therefrom. Because they do this under the adversary system they are in constant controversy and misunderstanding does result.

Your Committee will be hearing from those who are dissatisfied, in fact on your first page of your statement where you indicate from whom your Sub-Committee will be hearing you describe only the dissatisfied. We find as I have stated that most of our dissatisfaction in this State results from misunderstanding and I trust that your Committee will keep the complaints of the few dissatisfied in perspective of the total service afforded the Country by my profession.

I would like to take up the various specific topics that your Sub-Committee is considering as listed on the beginning of the second page of your remarks.

In this State we have had no minimum fee schedule for three years. We know nothing of five hundred dollar fees for checking the title to a home. I would estimate that the average abstract examination fee for the ordinary residential property in South Dakota runs from thirty five to fifty collars depending on the volume and complexity of the title chain. From my experience a five hundred dollar fee would be an exorbitant fee for title examination work. By saying that I do not mean to preclude unusual circumstances that might justify such a fee. If it is typical of the situation in the area where it resulted I assure you it has nothing to do with the situation in South Dakota.

Honorable John V. Tunney

Page Three

On the subject of government regulation and subsidy of legal fees. I know nothing of the cases involving Black Lung Benefits and am unable to comment on their complexity or the propriety of the fee you mentioned. Every South Dakota lawyer is familiar with contingent fee arrangements with the Client. It is the key to the Court House for many litigants, particularly the poor. In most tort cases a twenty per cent fee is extremely modest and in my experience a lawyer who took very much tort work on twenty per cent contingencies could not make his services available to any except those with a sure case of liability. From twenty five per cent to thirty three and one third per cent is the usual arrangement in this area and I have heard no complaints of it.

You mentioned a situation where attorneys who secure benefits for Veterans are limited to the flat rate of ten dollars per claim. There are similar Federal statutory limitations in other areas. In my judgment these limitations are of no benefit to the public or the profession. They are not realistic. They do not represent adequate compensation to a lawyer who handles such a matter. They assure difficulty in having it handled.

We have one Public Defender program in one area of South Dakota. All other indigent defender work is done by private attorneys who are Court appointed and compensated at an hourly rate. I have had no personal experience with the Public Defender program as the one program is a pilot program less than a year in being. In a rural area such as South Dakota geography requires us to depend on Court appointed counsel and I believe always will to some extent. Indigent defendants are well represented in South Dakota by Court appointed counsel. To my knowledge the same is true of those represented by the Public Defender. My personal preference without personal experience with the Public Defender, is to extend the Public Defender system in urban areas in a State such as this one, with Court appointments filling the gaps in the most sparsely settled areas.

In this State we have a few types of proceedings where the Court has the power to assess an allowance for attorneys fees in favor of the prevailing party. However the general rule is that this cannot be done and is only done in a few specific type cases specifically authorized by the Legislature. I personally believe this should be extended though I do not believe it is a proper subject for Federal legislation, at least on matters in State Courts. Care must be exercised in extending it however so that a litigant with a good case of liability will not load on extra costs to compel surrender on the issue of the amount of damages.

Honorable John V. Tunney

Page Four

I think there is some danger in extending the taxation of attorneys fees. It can promote Client unrest and misunderstanding. Many people think that they should not have to pay to obtain what is theirs as a matter of right.

For many years our largest city, Sioux Falls, has had a legal aid program manned by local lawyers on a voluntary basis furnishing legal aid for those who cannot afford to hire it. In the rest of the State most lawyers do the same thing but not on an organized basis, that is, nearly every lawyer discounts the bill or makes no charge in cases where persons needing legal services have no ability to pay.

When legal services programs under the office of Economic Opportunity came into being seven or eight years ago, the State Bar of South Dakota applied for funding for a Judicare Program and this was denied. The Judicare concept of course contemplates the use of private practicing attorneys who bill the Legal Services Program instead of the Client in the case of indigence. In a rural area this type of a program is the only one that can really make legal services available to every indigent person. There is no way to put in full time employees of Legal Service Program in small county seat towns in rural areas. Funding was denied for Judicare in South Dakota. Folks here think it was denied because the powers that be in OEO Legal Services were more interested in full time staff employees who would promote social change than in actually getting run of the mill and day to day legal services available to poor people. We do have Federally funded Legal Services Program on the Indian Reservations in South Dakota and these have made a good contribution in recent years to provide legal services to indigents. I expect that there are some poor people now in South Dakota who do not obtain legal services because of inability to pay or because of the fear that they do not have the legal ability to pay the charge that will be made. I honestly do not believe there are very many but must concede that there are some. If the Judicare concept were authorized, whatever problem in this area remains would be remedied immediately.

There is the occasional lawyer who acts unethically and dishonestly. We have an active Grievance Committee and our disciplinary procedures are reasonably rapid and effective. We have a Client Security Fund. Bar By-Laws require that each lawyer contribute twenty dollars annually for the Client Security Fund in order to provide a fund to make payment to any who may be wronged financially by a member of the profession.

I personally believe that the public relations program of the Bar needs to be expanded in some way to educate the public more fully as to what problems require lawyers. The disciplinary rules that

Honorable John V. Tunney

Page Five

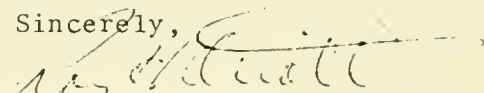
prohibit solicitation of business leaves the profession with a low profile and I truly believe there are sometimes people who do not recognize that the problem they have is one that needs the attention of legal counsel. Those areas that have adopted the Lawyer Referral Service have been able to ethically put on a much better public education program of services available from law offices. We have no Lawyer Referral Service in this State.

I disagree with your fourth page comment that there is a growing chasm between the legal profession and its constituents the citizenry. That may be true in some areas but I do not believe it to be true in this State. Nor do I agree that Watergate has caused South Dakota citizens to lose confidence in their lawyers. Politicians as such have been besmirched by Watergate in this part of the Country but I do not believe that is true of the legal profession. The public mind here has readily drawn a distinction between the lawyers engaged in the active practice of law and serving the people and those persons with law licenses who are engaged in political and governmental activities. I think we need to be ever vigilant in intensifying the instruction and indoctrination on legal ethics that we give both to students and active practitioners. In South Dakota I believe that both our admissions procedures and disciplinary procedures are effective.

I am proud to be a lawyer. I think that many of the problems you contemplate have been greatly minimized in the last few years with the activities of the lawyers and organized Bar Association as well as government funded legal services programs. The large numbers of new attorneys who are leaving Law School and going into private and public practice are imbued with ideas of public service. Their very number must serve to make legal services fully available. Activities of Bar Association in such matters as Legal Aid, Prepaid Legal Service Programs and Lawyer Referral Services are gaining momentum. Consider the sources of the complaints that come before your Sub-Committee and extend to our profession the courtesy of looking for the good as well as the bad as you continue in your efforts.

I hope these thoughts will be of some help to you and your Sub-Committee in the work you are pursuing.

Sincerely,


Ross H. Oviatt
President

RHO:mjs

TENNESSEE BAR ASSOCIATION

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NASHVILLE, TENNESSEE 37201

October 30, 1973

Sen. John V. Tunney, Chairman
Subcommittee on Representation
of Citizen Interests
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Senator Tunney:

I appreciate your October 11 letter concerning the ability of individuals or groups to obtain adequate legal representation in the settlement of their grievances.

While I am replying as President of the Tennessee Bar Association, I cannot in fact represent to you that I am acting pursuant to the authority of the Board of Governors of that Association in writing this letter nor that the views expressed herein represent the views of either a majority of the Association members or the governing body. It is my opinion, however, that the views which I express do represent the consensus of a majority of the membership.

For some time, we have recognized that the indigent citizen through either the voluntary efforts of the Bar or through various welfare programs have been afforded some substantial legal representation. In like manner, representation to the affluent has never been a problem in the opinion of most lawyers. It is the group in between who have the problem of either not knowing a lawyer, not knowing the services which a lawyer renders, not knowing the method which a lawyer employs in charging for his services that have been deprived of representation. Further than that, we recognize that this is especially true in the field of small claims, primarily consumer complaints. Our immediate reaction has been that

Page 2

Sen. John V. Tunney, Chairman

October 30, 1973

some form of prepaid legal insurance or group insurance is going to be necessary in order to meet this growing need and, accordingly, some months ago I constituted the committee of the Tennessee Bar Association known as the "Committee on Economics of Law Practice" as a task force to present to the Board a plan of group legal services of the open panel type either to be implemented by the Bar Association alone or in conjunction with a commercial insurance company. We have examined and are considering both the Philadelphia Plan and the Shreveport Plan and in like manner have looked to the California Plan. As to what result will finally be reached, I cannot at this moment prophesy.

I do feel that this is a matter which should be handled by the Bar Associations and not by some national corporation formed by the Congress of the United States. Our Association will be pleased to be kept informed as to the results of your hearings and investigation and any proposals of a concrete nature to be made by your Subcommittee to the Congress.

Very truly yours

Harlan Dodson

HD:mn

cc: Sen. Howard H. Baker, Jr.
Sen. William E. Brock III



UTAH STATE BAR

OFFICE OF THE PRESIDENT
2651 WASHINGTON BOULEVARD
OGDEN, UTAH 84401

November 13, 1973

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President

Joseph Novak
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Salt Lake City, Utah 84101
President-elect

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203 Kearns Building
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Executive Secretary

Honorable John V. Tunney, Chairman
Sub-Committee on Representation of Citizens Interests
Committee of the Judiciary
Washington, D.C. 20510

Dear Senator Tunney:

You have asked that we respond to the various topics to be the subject of investigation by your sub-committee.

We are pleased to submit the following responses:

Consumer access to attorneys and minimum fee schedules

While there may be abuses stemming from the use of fee schedules, such as that delineated by you stemming apparently from a Virginia experience, on balance we are of the view that a fee schedule generally is beneficial to the public, as well as to the bar, and to individual attorneys.

Wisely used, fee schedules tend to eliminate excessive charging for services, and tend to establish standard fees for similar services upon which the public can rely. Absence of any schedule, leaves members of the public with no frame of reference to know whether the fee charged is in line with the service rendered, or whether it represents an excessive fee.

We submit that the average potential client is neither so sophisticated nor so persistent as was Mr. Goldfarb in the Virginia case. The average client who does not use legal services regularly will contact one lawyer, perhaps two, and having received a fee quote will either undertake the service or not, depending upon the relative value to him the service represents, as against the fee quoted. It will be a rare thing that the fee will be established by greater interplay than this.

Fees quoted in such circumstances may be fees justifiable by the station of the attorneys in the economic scale, without

Honorable John V. Tunney
November 13, 1973
Page 2

reference to what an "average" or "minimum" fee ought to be, or without reference to what his brethren might charge for a like service. We think invariably in such circumstances, the fee quoted would be higher than the fee that would have been quoted had a fee schedule been in existence.

In Utah we have never had a minimum fee schedule in this state. We have in the past had an advisory schedule which helped attorneys to ascertain an approximation for fee charges. However, prior to the Virginia case, acting upon appropriate legal advice, we discontinued even this device.

We now have placed the public and attorneys at a disadvantage when dealing with each other, in that neither has a frame of reference from which to begin. The lawyer, not knowing what he should charge, but being interested in increasing his position in the economic sphere, is likely to quote his services on an appreciated scale, whereas the potential client, without a basis for estimating the value of the service to be rendered, must accept the fee quote or look elsewhere for the service, but is equally at sea when receiving subsequent fee quotes. Suppose, for example, a variation of 50% in the quotes. The question then becomes one of discerning whether in fact the lesser quote is really an adequate service - a judgment the prospective client lacks the sophistication to ascertain.

We are of the opinion that fee schedules tend to standardize fees at a relatively lower scale than is the case in the absence of fee schedules. To this extent it is a disservice to the public to abolish them.

In a sense, the advantage foreseen in their abolition is the same questionable advantage manifest in the Truth in Lending Legislation resulting in the abolition of the doctrine of usury and the virtual elimination of maximum interest rates. Presumably the philosophy of this legislation was that the consumer public would be educated as to the interest and carrying charges and would go into transactions with their eyes open. Unfortunately, the economy dictates the purchasing power of individuals, and the result is an excessive over-all increase in service charges and interest which the consumer public knows about, but is powerless to do anything about since they must purchase on time transactions. No negotiating position exists for the average consumer.

We feel that lack of sophistication may reap the same general result in legal fees, since only knowledgeable people will obtain sufficient fee quotes, and these are the people who have already established

Honorable John V. Tunney
November 13, 1973
Page 3

working relations with lawyers, and do not need fee quotes from several attorneys.

The abolition of fee schedules is a deterrent to meeting the increased needs of the public for legal services, rather than making such services more freely available.

Parenthetically, we question whether the individual lawyers in the Virginia case were entirely correctly quoted in that case relative to it being unethical to charge less than the minimum fee. We are aware of the ABA opinion which, before abrogated, in effect said that habitual charging of a fee less than the minimum might be considered as advertising and hence unethical. If the nineteen lawyers queried actually were quoted correctly, then it would appear that they were either unaware of the ABA opinion, or else elected to ignore it, since clearly they could have, in a proper case, ignored the fee schedule.

Government regulation and subsidy of legal fees

Any comment on this phase of the investigation must necessarily first be prefaced with a consideration of the philosophy behind the regulations and subsidies.

If you believe that there should be an independent forum for the resolution of disputes, whether it be an administrative forum or a court, and if you believe that the aggrieved party should be entitled to professional services in pursuing his claim, then one can scarcely justify the veterans benefits review at \$10.00 as a flat rate.

It was impossible for an attorney to profitably represent veterans at the time of the institution of the \$10.00 fee, and this situation has never varied. The philosophy behind this procedure must necessarily have been a paternalistic philosophy, which said, in effect, that the government would take care of the needs of these persons with little skilled outside help.

In other areas, involving substantial rights, such as the Black Lung Benefits Act, and where a fee commensurate with the services rendered is available, persons do obtain substantial professional services in the protection and preservation of their rights. We are unable to rationalize this as an indirect subsidy as stated in the memorandum. If the private business sector must be called upon to respond by insurance, or its own subsidization, to insure adequate representation of suffering persons, this charge should either be passed on to the private business or industry sector, or should properly be absorbed by the injured party in need of the skilled services.

Honorable John V. Tunney
November 13, 1973
Page 4

Criminal cases fall into an entirely separate category as we view them.

Adjudications make it abundantly clear that those charged with crimes are entitled to legal services, and that those who are indigents have the right to look to the government for that defense service, in point of payment.

We take this to mean that all taxpayers have an obligation to assist financially in making these services available. This does no violence to any concept of the obligation of a free society, which society also demands the prosecution of those charged with offenses.

In some instances, a Defender Program is the better solution. In others, the appointment system of private attorneys may be the best solution. Leaving the decision in the hands of the local Federal District Courts is a salutary solution, since presumably those courts should have a feel for the need that exists.

It would appear, however, that courts might consult more closely with State and Local Bar Associations to aid in determination of such matters.

Reasonable attorney fee awards

Undoubtedly it is true that in many instances the high cost of attorneys fees cloud the recovery of the individual. We applaud those instances where legislation has shifted the burden of attorney fees to the losing party where there has been intentional infliction of harm or where an important public interest is involved, as in the civil rights and environmental areas.

To the same extent, we applaud those instances and areas where the courts are entitled to review potential attorney fee awards to determine their reasonableness in other areas where litigation is involved before the Federal Courts.

In summary, it appears that as to the lawyer using public, those financially secure are able to obtain counsel with no difficulty. Those who are in the disadvantaged area are increasingly able to obtain counsel, basically by subsidized programs, either in the public or private sector, although by no means is the current representation adequate either in point of volume of existing services nor geographically in point of total numbers of people served.

However, effort is bent in this direction, and presumably either with the staff attorney approach or the judicare approach, these services will ultimately approximate need.

Honorable John V. Tunney
November 13, 1973
Page 5

The large reservoir of people, however, who scramble for legal representation are the same persons who purchase televisions on time, who buy their autos on time, who meet all of their existing economic needs on time, including medical and dental services.

The critical need is to place legal services within the range of these persons. Partially, at least, this is an education process, and one which Bar Associations should lead out in, as well as other agencies.

Lawyer Referral Services should be expanded and advertised in such a way as to let people in this category know of the availability of legal services at reasonable rates, in fact, in many instances at less than reasonable rates, designed to provide services as a public service.

Prepaid Legal Service Plans are also a partial potential answer as are bank financed legal service plans. Ingenuity is probably the major factor in the development of legal service delivery plans, and probably provides the answer to the burgeoning lawyer population also, at least until the law of supply and demand brings the lawyer population supply into reasonable focus.

We believe that legislation such as S.2288 which has the effect of allowing non-lawyers, and in many instances largely untrained real estate personnel, to handle substantial legal procedures is damaging to the public generally, and constitutes an obstruction to the very thing your sub-committee is discussing, that of providing access to legal services.

Parenthetically, we should note that an excessive lawyer over-population, without the expansion of the client service area, will result in disciplinary problems of an expanding nature, to the disadvantage of everyone, the public, the bar and the lawyers individually.

The work of your sub-committee is highly desirable in the main, and timely.

We tender you our support in any areas of inquiry tending to provide the best coalescence of assistance to the public in providing legal services, reserving judgment, however, in those areas where we deem the interest of the public to be little served by particular legislation or governmental activity.

Very truly yours,

LaVar E. Stark
President

LES:cs



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October 16, 1973

Honorable John V. Tunney
United States Senate
Member, Committee on the Judiciary
Chairman, Sub-Committee on Representation of Citizen Interests
Washington, D.C. 10510

Dear Senator Tunney:

I am pleased to respond to your letter of October 11 in which you have solicited my comments as President of the Washington State Bar Association on the subject of the Sub-Committee's inquiry. Your enclosed "Remarks" provided a most helpful statement of perspective.

The Washington State Bar Association consists of approximately 5,500 active members serving a population of approximately 3,500,000. Our projections, supported by the actuality of increased membership in the last two years and the actuality of vastly increased law school enrollment in the State of Washington, show that the rate of growth of lawyer population in this state is explosive. We anticipate that our Bar will have 8,000 active members by January 1, 1978 and 12,000 members by January 1, 1983. Population growth in this state will be insignificant compared to the growth in number of attorneys. The ratio of attorneys to general population on January 1, 1972 was approximately 1 to 750. It is now approximately 1 to 630. By January 1, 1978, the ratio will be approximately 1 to 450 and by January 1, 1983, approximately 1 to 325.

The Bar of the State of Washington, in recognition of the lawyer's professional responsibilities to the public and in anticipation of the rapidly increasing supply of lawyers, has in recent years been actively engaged in formulating and implementing programs which facilitate the delivery of legal services to the consumer.

Honorable John V. Tunney
 October 16, 1973
 Page Two

As respects the delivery of legal services to the indigent, every urban area of the State of Washington has a funded and fully structured legal aid program involving full time salaried lawyers. These projects have had the full support of the Bar of the State of Washington and of the appropriate local Bar associations. The large and active legal aid project in Seattle is an exemplary project which has attracted nationwide attention and it has been emulated in the other urban areas of the State of Washington and has extended into a number of non-urban areas. The Bar of the State of Washington has actively encouraged state-wide legal aid on a fully funded and structured basis utilizing the services of full time salaried lawyers. In those low population areas in which it has been impossible to obtain funding, legal aid is made available on the basis of volunteered part time work performed by attorneys, almost always at an office to which the attorney goes for the purpose of receiving the clients. The only limitation on the enlargement of the existing fully structured legal aid programs and the extension of similar programs into smaller areas to replace the completely voluntary services of local members of the Bar is the lack of funding. I would like to emphasize that additional funding by Congress for the delivery of legal services to the indigent will be promptly followed in the State of Washington by further expansion of legal services programs which involve salaried attorneys working on a full time basis.

The Bar of the State of Washington has actively pursued the creation of public defender offices. The concept of public defenders who are salaried at levels commensurate with salaries paid prosecuting attorneys is well entrenched in the State of Washington and is being implemented on an expanding basis. In some small counties with very light criminal dockets, comparable services are provided by court appointment on a case to case basis. Establishment of the public defender system is not controversial, and the lack of public defender systems in the low population counties is the consequence of light case loads rather than philosophical objection.

As the direction of the delivery of legal services to indigents became better defined, our Bar in recent years has given particular attention to the problems of delivery of legal services to persons of moderate or middle income.

It would be a tragic mistake if the thrust of your inquiry were directed to what is presumed to be excessive charges made by lawyers in general. It should be recognized that the average level of lawyer income, and particularly the level of lawyer income of those lawyers who are in fact serving individual clients, is by no means excessive. The cost of maintaining a law office, whether it houses an individual practice or a small or large partnership, has increased in common with the cost of everything else. Salaries paid to employees, the cost of equipment and supplies and the cost of maintaining libraries have all risen steeply in recent years.

Honorable John V. Tunney
October 16, 1973
Page Three

Particularly in those offices in which the lawyers provide services for an appreciable number of middle income clients, there has been a constant effort to hold down and, if possible, reduce the cost of services by increased use of para-professionals, sophisticated equipment, and programmed material, all of which are designed to increase efficiency. As this necessary type of development increases, the proportion of overhead cost involved in the delivery of services by the lawyer increases, and the portion of the fee which inures to the net income of the lawyer decreases. The development of this mode of delivering legal services to middle income clients is rapidly accelerating and represents a positive approach to the problem, especially as it pertains to such legal matters as estate planning, probate, real property transactions and office advice and counseling. Coupled with this development is increased specialization, not in esoteric fields of law, but in the delivery of types of services commonly needed by the middle income client.

There is a problem area in which the techniques referred to above cannot significantly improve the existing situation. It is not economically feasible for attorneys to handle many types of litigation which involve relatively small amounts of money.

There are, however, at least three recent developments in this state which favorably affect the resolution of small dollar amount litigation. First is an increase in the jurisdiction of small claims courts in which the parties resolve their differences without representation to \$300. An increase in that limit is obviously a further possibility. Second is the provision for treble damages and award of attorney fees in consumer fraud cases. Third is a provision for award of attorney fees to the prevailing party in certain cases in which the amount in dispute is less than \$1,000.

The greatest assurance of delivery of legal services to the middle income public at a cost well within means lies in the development of plans for prepaid group legal services. Amendment of the Internal Revenue Code would greatly facilitate the ability to market plans for prepaid legal services. I cannot over-emphasize the importance of such plans to the subject matter of your inquiry.

We recognize the problem of obtaining redress for the individual citizen who suffers an institutional wrong and we encourage the assessment of the cost of his redress as an item of damages, at least where a governmental agency is involved.

Our Bar, in common with all others, has many skilled lawyers who specialize in personal injury litigation, and it has many fine lawyers who ably represent

Honorable John V. Tunney
 October 16, 1973
 Page Four

corporate and other business interests. The demand for that type of professional service is not sufficient to absorb the vast numbers of new practitioners entering the practice of law. It is therefore inevitable that a substantially increased number of highly competent lawyers will be developing the skills and the efficient techniques needed to provide middle income legal services at costs as low as the inexorable economics of practicing law will reasonably permit. It is also inevitable that there will be a rapidly increasing distribution of lawyers into neighborhood offices and small communities.

It should be noted that minimum fee schedules have been abandoned in this state, both formally and in practice. In addition, the Bar of the State of Washington and several local bar associations have implemented lawyer referral services to facilitate access to lawyers by members of the middle income public with particular emphasis on matching the client's problem to the lawyer's skill.

I firmly believe that the legal profession, at least in those western states with which I am familiar, has in recent years established the proper foundation for a significant improvement and increase in the delivery of legal services to the lower and middle income public. Congressional efforts to belabor or chastise the profession seem to me to be clearly unwarranted, as well as untimely, and I am gratified to note that your concerns are not directed toward that approach, but rather to a determination of what can be done, and what is being done, of a constructive nature. I would strongly recommend to the Sub-Committee the following:

1) Congressional action to amend the Internal Revenue Code so as to eliminate any taxable consequence to an employee arising from either the employer's contribution to a prepaid group legal plan or the receipt of legal services therefrom.

2) Congressional action to provide further funding for legal services to the indigent;

3) Further Congressional action to encourage expansion of public defender programs;

4) Public recognition by the Sub-Committee of the effect of the increase in lawyer supply on the middle income public's need for legal services, and the desirability of prepaid group legal services as a means of fulfilling that need;

5) Increased attention to the award of attorney's fees to successful litigants in actions brought to redress institutional wrongs.

Very truly yours,


 Cleary S. Cone

F1/4-571

WYOMING STATE BAR

OFFICE OF THE PRESIDENT
THOMAS MORGAN
306 S. GILLETTE AVE
GILLETTE, WYOMING 82716
(307) 682-7213

October 30, 1973

The Honorable John V. Tunney
Chairman
Subcommittee on Representation of Citizen Interests
Committee on the Judiciary
Washington, D.C. 20510

Dear Senator Tunney:

Your letter of October 11, 1973, together with the copy of your remarks to the Subcommittee on Representation of Citizen Interests, has been read and studied, and I wish I had the knowledge and insight to offer some solid solutions to the problems you raise. I have no official position statement I can give you as the official position of the Wyoming State Bar, but can tell you that we are aware of the problems and are doing some planning, and making some progress.

First, let me say that apparently our problem is not nearly as acute as the picture which you draw, probably because we are a rural area, and because of the personal contact by lawyers with the public in general, and the responsibility the individual lawyers have taken in accepting representation of people who have a valid legal problem without redress of their grievances or injustices. I can state personally, after thirty-three years of being a member of the Wyoming State Bar, and having practiced in a small town for the past twenty-five years, that the small-town lawyers have accepted this responsibility, and I believe, have done a creditable job to this time, although the picture is changing as we grow and the problems of living become more complex, the demands for legal services grow faster than the number of lawyers with time available to perform their pro bono publico work and meet their increased costs of operating a law office and meeting their own economic demands. We have two County Bars in Wyoming in our two most populous centers (which, of course, are small towns on the national basis) at Casper and Cheyenne, which have very good programs for taking care of needs of those who cannot afford to pay for legal counsel. Because of the above, it is my opinion that in Wyoming, we do not have the results mentioned in your remarks of having any notable erosion of constitutional or other rights; imbalance in the legislative forums; or loss of faith in our governmental processes.

The Wyoming State Bar has, for the past few years, had a committee on prepaid legal services, headed by a past president of our Bar, Mr. Ross D. Copenhaver, P.O. Box 839, Powell, Wyoming 82435, which is financially supported by the State Bar, and is actually working on a program. We have had programs and reports at our State Bar meetings, and are attempting

The Honorable John V. Tunney
October 30, 1973
Page Two

to meet the problems of our state in this regard, in what I believe to be a responsible and adequate manner. In saying this, I realize that what may be adequate for Wyoming would probably not be adequate for California or some of the other more populous states. I am, however, of the opinion that in Wyoming, we should have different solutions because our problems are different, and that it should be taken care of on the local rather than a national basis. I would, therefore, be dubious of the advisability of Federal legislation.

As to your suggestion that Federal subsidies might be necessary, I can only comment that this would, of course, carry with it the necessary legislative controls, such as the standards established for the O.E.O. program, and I have only a slight familiarity with one such program, being the Legal Services for Laramie County, Inc., at Cheyenne. In that project, I understand that the Federal subsidy in 1973 amounted to approximately 80 per cent of the total budget, and that the consultant/contributive share from the local Bar was approximately 20 per cent of a total budget of about \$60,000.00.

I note an interest by the recent graduates from our Law School at the University of Wyoming in pro bono type of programs. I am also a member of the Board of Law Examiners, and have been for six years. We have an established practice of interviewing each applicant for admission to the Wyoming Bar briefly after they have taken the examination. I recognize the merit in your statement that the younger lawyers are more interested in devoting some time to pro bono publico activities, and some are looking forward to full-time employment in O.E.O. type of programs. However, they also are looking forward to the time when not only all the people who are in need of representation can receive the same, but that their earnings will also increase so as to afford them a better living.

We have not been unmindful of the changing times, and are constantly reminded through the American Bar Association that we must exercise an expanded role in public interest law. The President of the American Bar Association, Mr. Chesterfield Smith, and the President-Elect, Mr. James D. Fellers, are both very conscious of the problems being considered by your subcommittee, and are encouraging dialogue in their various meetings throughout the country. I believe they will furnish the necessary leadership, to co-ordinate the efforts of the various State Bar organizations to come up with some good recommendations for your committee, which we hope will lead to solutions for the

The Honorable John V. Tunney
October 30, 1973
Page Three

problems of all those in need of legal assistance to obtain the same, and still meet the economic needs of the lawyers furnishing these services.

Very truly yours,


Thomas Morgan

TM:plh

LES J. HARTLEY

ATTORNEY AT LAW

1901 AVENUE OF THE STARS
SUITE 1600
LOS ANGELES, CALIFORNIA 90067
(213) 553-1600

November 2, 1973

Senator John Tunney
New Senate
Office Building
Washington, D.C. 20510

Dear Senator Tunney:

Re: Senate Judiciary Subcommittee in the Representation
of Citizen Interest

This is in response to your letter of 10/23/73. Candidly, it is my opinion that the subcommittee investigation should have been initiated twenty years ago, because many of our current economical and social problems stem directly or indirectly from the inability of an individual or a group to obtain adequate legal representation. While I do not believe that the practice of law should be socialized, I sincerely feel that a multitude of reforms are long overdue. For example:

1. Ethical strictures on the use of credit cards should be abolished or substantially reduced so that the average person with median income can secure legal services and pay for the same out of future earnings.

2. The current movement to facilitate group legal insurance programs should be encouraged with appropriate tax incentives, not only in the area of prepaid plans but also in the area of indemnity (insured) plans. Prepaid plans because of their very nature ought to be subject to the same fiduciary safeguards that have been proposed in connection with current pension reforms. More fundamentally, as a matter of practical economics, group legal plans will only become a serious subject of collective bargaining when national health care legislation is enacted because at the present time, maintenance of benefits for private medical plans as an overriding priority claim over the dollars available in the fringe benefit "pie".

3. Federally funded legal service offices (OEO) while doing a fine job, have unfortunately ignored the resources available in the private bar, and should be given reasonable guidelines to promote a greater degree of cooperation with legal reference services so that cases with "fee potential" can be referred more effectively to the private bar.

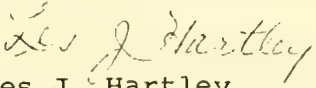
4. Because of the aggregation doctrine of Snyder v. Harris, 394 US 332, many federal district courts have declined to exercise jurisdiction in class actions that ought to be maintained on an national level. Due to unsettled state law, many class actions that are metitorious that would have a beneficial effect on litigation on a national level, are reduced in scope to state wide classes only. As a consequence of Snyder v. Harris, one side effect of a successful litigated state wide class action is unjust enrichment to the Defendant in the other 49 states.

5. As you know, the medical profession, through a combination of private insurers and governmentally funded plans, have been able to do a far better job in proving health service to the general public in the last 25 years than has the legal profession. Reflecting back, it occurs to me that medical associations, in part because of a "fear" of socialized medicine, were able to put the medical profession on a profitable and paying basis; notwithstanding the information you may receive from various bar associations respecting bar association sponsored group legal service plans, the realities for a variety of reasons lead me to conclude that such programs have, at best, a remote chance of ever being successfully implemented.

Apart from having the privilege of currently serving as president of the Century City Bar Association, my own thinking has been significantly effected by the fact that I also have the privilege of organizing a group legal section and a class action section in Century City and have acquired a substantial amount of information and have participated in a variety of programs in this field, some of which have been less frustrating than others and have come to believe that local, regional and statewide efforts are inadequate to bring about the kind of reforms which I believe is required. Consequently, I would welcome the opportunity to further discuss the same with you or the staff of the su committee either before, or after November 6, 1973 and strongly suggest that the subcommittee extend the 11/6/73 closing date because, quite frankly, if I had not had two trials continued I would have not had the time to respond to your letter of October 23, 1973.

In these times of national crisis, in which the legal profession and our system of justice have become a matter of national concern, I sincerely feel that you have the unique opportunity through the Judiciary Subcommittee to accomplish a mission of historical consequences, not only for the profession but for the country as well. If you sincerely wish to effectively open the doors of our nation's courts to the vast majority of our citizens, I respectfully suggest that the doors of the subcommittee not be closed after so short a time.

Sincerely yours,

A handwritten signature in cursive script that reads "Les J. Hartley".

Les J. Hartley
President of the Century
City Bar Association

MARIO E. DE SOLENNI
ATTORNEY AT LAW
329 G STREET P O BOX 399
CRESCENT CITY, CALIFORNIA 95531
TELEPHONE 464-6181

November 2, 1973

The Honorable John V. Tunney
U.S. Senator from California
Chairman, Senate Judiciary Sub
Committee on the Representation
of Citizen Interest
Senate Office Building
Washington, D.C.

Dear Senator Tunney:

In response to your letter of October 23, 1973 and your attached opening remarks, please permit me to make the following comments on behalf of myself and the Del Norte County Bar Association. Possibly our comments will be of some benefit because Del Norte County is, as you no doubt are aware, a rural county, historically depressed, and geographically isolated.

1. Your opening comments gives one the impression that you have little understanding of the economics of law practice. Having kept fairly close records of services rendered over several years (the principal factor in determining my billing is the amount of time rendered except in contingent or statutorily set matters) has made it clear to me that out of an eight or nine hour day a lawyer is indeed fortunate who can manage to squeeze five hours of time directly chargeable to one specific client or another. The experience of practitioners in this area with whom the matter has been discussed indicates twenty-five hours of chargeable time is the maximum that can be squeezed out of a five-day week while twenty hours is a far more realistic, though somewhat optimistic, average. I think you will agree that a lawyer ought to be entitled to compensation of somewhere in the neighborhood of Twenty Thousand Dollars per year before taxes, retirement plans, hospitalization, and the like. That is only slightly more than a reasonably skilled tradesman such as a plumber or carpenter earns for his forty-hour work week. Assuming our average of twenty billable hours a week with a little vacation time it does not take too long to ascertain that the Twenty Thousand Dollar annual figure is worth the gross profit of Twenty Dollars per billable hour. Based on my own experience, rent, utilities, employee taxes, wages, books, travel, and education expense (somewhat more expensive here because of the necessity of traveling to San Francisco or Sacramento for most Continuing Education of the Bar courses) create an hourly overhead of between Twenty and Twenty-five Dollars. This experience is likewise borne out by the analysis of other members of the Bar in Del Norte County and also in Humboldt County. Depending on what one includes in an overhead figure, the dollar amount varies from twenty to thirty dollars. Therefore, to live frugally, the lawyer must produce for

Page 2

each billable hour a gross income of about forty-five dollars to provide a modest existence for himself and his family and some retirement benefits. These figures of course do not reflect inflationary factors which have been created by virtue of the financial policies of the present administration, but I suspect that to produce a standard of living equivalent to that enjoyed, say, in 1972 during 1974 I will probably have to produce the gross income of closer to fifty to sixty dollars per hour. Frankly, given the economic circumstances of this county I do not know how I can do it.

2. We at the present time lack a legal aid service but are in the process of forming one to handle certain specific areas where problems most commonly arise. My own experience indicates that the vast majority of local legal aid type problems can usually be resolved in the course of a fifteen or twenty minute conference for which we intend to charge a nominal fee if the parties can afford it, or no charge if they cannot. But I can assure you that some of the people who scream most about Two Hundred and Fifty or Three Hundred Dollars plus costs for a Dissolution of Marriage, including the Property Settlement Agreement, and the like, think nothing of spending that much every month or more for an expensive automobile and a recreational vehicle. Both of mine are paid for and six and twelve years old respectively, so their complaints tend to fall on deaf ears.

3. Clearly, some realignment of our credit economy is in order. Many people plainly are spending too much money, especially interest, for things they cannot afford and foregoing the things they need, including legal services even when the latter are priced reasonably.

4. (My own viewpoint) Regrettably I do not necessarily agree with you that the solution to Watergate and legal services to the poor lies in a reformation of the economics of the legal profession. The problem is a moral one. Ultimately the problem is a product of our very secularist and somewhat Calvinist way of life. We have no God but the dollar and material well being is the greatest of all virtues. But it is only when we will realign ourselves logically and morally, recognize that there is an Authority higher than and outside of the United States Government and the United States Supreme Court, and get the legal profession to recognize that its practitioners have a responsibility to see that justice is done which is at least equal to whatever their responsibility is to their clients' position, with whatever consequent erosion of the advocate system such a recognition would have, that our problem will be resolved.

For further suggestions on how this might be accomplished, I might suggest you contact Brent Bozell, a sort of black sheep Catholic radical relative of the Buckley clan, who I am sure can give you more eloquently phrased thinking than I on this particular subject.

Very truly yours, .

DEL NORTE COUNTY BAR ASSOCIATION

MARIO E. de SOLENNI, President
Medes/kc

LOS ANGELES COUNTY BAR ASSOCIATION

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PRESIDENTCHRISTIAN E. MARKEY, JR.
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SENIOR VICE PRESIDENTFRANCIS M. WHEAT
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606 SOUTH OLIVE STREET
LOS ANGELES, CALIFORNIA 90014
TELEPHONE (213) 624-8571

November 2, 1973

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FRANCIS M. WHEAT
SAMUEL L. WILLIAMSHonorable John V. Tunney
United States Senate
Committee on the Judiciary
Subcommittee on Representation
of Citizen Interests
Washington D. C. 20510

Dear Senator Tunney:

On behalf of the Los Angeles County Bar Association, I would like to take this opportunity to provide information for your official subcommittee record on a special program of our association which relates directly to legal representation of the average citizen. The Lawyer Referral Service, through the office of the bar association and in accordance with its rules*, made approximately 5,000 referrals during the year 1972. By simply changing the procedures this year to allow interested persons to contact the service by telephone, rather than in writing or in person, the number of referrals has almost tripled. On an annualized basis it is now projected that about 17,000 referrals will be made this year. It should be explained that although a person interested in the services may now contact it through the association by telephone, the names of the lawyers to whom the interested person is referred are mailed directly to the calling party and not given out over the telephone.

Unfortunately, there does not exist within the association or the service any procedure by which the results of referrals can be or are compiled. Of the many thousands of referrals made, we just simply do not know how many result in lawyer contact, satisfactory or otherwise.

* A complete copy of the service Rules, attorneys' registration form, and public information pamphlets are attached.

Senator John V. Tunney
November 2, 1973
Page Two

It is significant to note that there is currently under consideration a change to the rules of the service which would amend Rule 3 to include a second panel as follows:

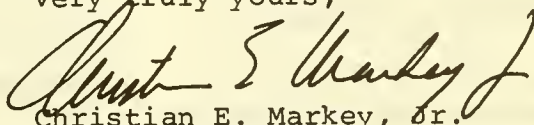
A second panel (salmon cards) to be used exclusively for references in response to inquiries from lay-applicants of modest means, and more particularly lay-applicants whose total monthly gross income including welfare, Social Security, Veterans Administration and other similar benefits) does not exceed the sum of \$400.00 per month (averaged on an annual basis) or, in the case of a lay-applicant dependent upon another for support or with dependents, the sum of \$400.00 per month plus \$100.00 per month for each dependent in the family unit, the family unit to include spouse, children or other dependent persons and the combined income of all persons in such family unit being taken into account to determine if such test has been met.

There are currently under consideration other rule changes which will, I feel confident, enlarge the services provided thus benefiting a greater number of citizens.

On another subject, I would like to add, on behalf of the association which will soon be approaching its centennial year (captioned above), that it does not have and has never had minimum fee schedules nor has it ever encouraged their use.

Thank you for allowing us the opportunity to present this brief report to you and your subcommittee.

Very truly yours,



Christian E. Markey, Jr.
President Elect

CEM:rn

Enclosures

WHAT TO DO WHEN YOU NEED A LAWYER



LOS ANGELES COUNTY BAR ASSOCIATION

606 South Olive Street, Suite 1212
Los Angeles, California 90014
624-8571

Referral Hours: 9 a.m. — 4:30 p.m.

... there comes a need

To everyone there comes sooner or later, the need for sound legal advice; but many persons have no family lawyer and do not know an attorney. To meet this need and to make available to every person in the community the services of competent, experienced lawyers, the Los Angeles County Bar Association has established The Lawyers Referral Service.

What is The Lawyers Referral Service? Simply this . . . It is a panel of experienced lawyers, all members in good standing of the Bar Association, who are available to assist people who need a lawyer.

How does The Lawyers Referral Service operate?

Here are several questions and answers which explain the operation of the Service.

- Q. *If I have a legal problem but do not have or know a lawyer, what do I do?*
- A. Call in person or write a letter to the Bar Association office, Suite 1212, 606 South Olive Street, Los Angeles, California 90014. Do not telephone.
- Q. *What happens when I come to the Association Office?*
- A. You will be privately interviewed by a qualified staff member of the Bar Association to determine the nature of your problem.
- Q. *Does he or she then give me legal advice?*
- A. No. You will be given the names of three lawyers from the panel who have had experience with your particular kind of problem.
- Q. *When do I see the lawyer?*
- A. You must make your own appointment with one of the attorneys.

Q. *What happens if I write a letter to the Bar Association office?*

A. A staff member will review your letter and you will be sent by return mail the names of three lawyers from the panel who have experience with your particular kind of problem.

Q. *Is there a fee for this referral?*

A. No. This is a service given by the Los Angeles County Bar Association.

Q. *Suppose I cannot afford even the consultation fee?*

A. There are offices operated by the Legal Aid Foundation and the Office of Economic Opportunity (OEO) for those people who cannot afford to pay for legal services. We suggest you check your telephone directory for the nearest office.

Q. *Is there a fee for the interview in the lawyer's office?*

A. Yes, a \$15.00 consultation fee.

Q. *What do I get for this consultation fee?*

A. A half hour of consultation and advice.

Q. *What if my problem cannot be solved at the first conference?*

A. Your lawyer will then decide whether he can take your case. If he cannot he will tell you so and advise you what to do next; on the other hand, if he thinks he can help you, he will tell you how.

Q. *Suppose he takes my case or thinks he can help me, what then?*

A. You should employ him to represent you as your lawyer. You and he should then agree on what he is to do and how he is to be paid.

Q. *Does The Lawyers Referral Service supervise the lawyer or his work after he has taken my case?*

A. No. After you and your lawyer have begun working together on your problem, the Service does not attempt to supervise the lawyer. You should give to your lawyer your complete and wholehearted cooperation; and you may expect his in return.

Q. *If the lawyer takes my case, what about his fee?*

A. That is to be arranged between you and your lawyer.

Q. *How does a lawyer set a fee?*

A. Ordinarily a lawyer cannot tell you in advance what his fee will be because he does not know how much work he will have to do to solve your problem. A fee is usually based on the following factors: the time and work he puts in, the difficulties involved in working with your problem, the amount of money involved, and the good resulting from his work.

Q. *What can I do to help the lawyer at the first consultation?*

A. You should bring with you *all* your papers about your problem. Your lawyer will need them.

Q. *In what ways can a lawyer help me?*

A. A lawyer can be a wise and trusted counsellor who can always provide you with sound and competent advice on any problems which are legal in nature. For instance, some of the things he can do are listed below:

He can wisely handle matrimonial and family problems.

He can give you advice on the handling of the estates and belongings of deceased members of your family.

He can sue to recover damages for personal injuries to yourself or members of your family.

He can handle real estate transactions and advise you about them.

He can help you with problems involving landlords and tenants.

He can be helpful in all kinds of business problems.

He can assist in forming partnerships and corporations.

He can help you if you are accused of the commission of crime.

He can draw your will.

He can handle problems involving the payment or return of your taxes.

*If you have any other questions about
the operation of the Service,
see*

**LOS ANGELES COUNTY BAR
ASSOCIATION**

606 South Olive Street, Suite 1212
Los Angeles, California 90014
624-8571

Referral Hours: 9 a.m. — 4:30 p.m.

*The Lawyer Referral Service
is operated as
a Public Service
by*

**LOS ANGELES COUNTY BAR
ASSOCIATION**

606 South Olive Street, Suite 1212
Los Angeles, California 90014
624-8571

Referral Hours: 9 a.m. — 4:30 p.m.

HOW MUCH

DO

ATTORNEYS

CHARGE?

DISCUSS FEES AT THE FIRST VISIT. Almost everyone prefers to know what a service will cost. Persons visiting an attorney are no exception. When you visit an attorney for the first time, ask about the fee. Your lawyer will want you to be satisfied both with his service and the charge. The attorney knows that if good service is given and the charge is fair, you will be back and you will send your friends and acquaintances. That is the way a lawyer maintains and increases his practice.

Don't hesitate to discuss the fee or your ability to pay. Not only is it completely proper, but your attorney will appreciate it.

OFTEN A LAWYER CANNOT SET AN EXACT CHARGE IN ADVANCE. Frequently attorneys cannot estimate their fees for no one will know how much work will be involved or what the results will be until the matter is completed. In such cases they may only be able to tell you the approximate fees that will be charged. Again, your attorney will be happy to discuss the matter with you.

WHEN DO YOU HAVE TO PAY? The time for payment of legal fees depends on the type of legal service rendered. In many cases your attorney will expect a fair down payment (called a "retainer") to cover the initial work. In other matters, you will be billed monthly, or at the completion of the service.

If you are not sure you will be able to pay promptly, talk it over with your attorney. You will be able to reach an arrangement that is fair.

MANY FACTORS AFFECT FEES. Because it is impossible to list all of the types of problems that are brought to lawyers' offices and because lawyers, like doctors and dentists, do not all charge the same amount for their advice and service, no one can draw a list of standard fees.

The best that can be done is to discuss some factors that most attorneys take into account in setting their fees:

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LOS ANGELES COUNTY
BAR ASSOCIATION

606 So. Olive St., CA 90014 • 624-8571

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(1) The *amount of time* spent on a matter is always important. Of course, different attorneys value their time at different rates because of the difference in their experience, specialized knowledge or skill. This is not to say that there is no degree of uniformity. Most lawyers know what others with similar ability and experience charge and endeavor to keep their fees in line. Remember that lawyers know it is important that you be satisfied.

(2) *Ability, experience and reputation* are important. Good law school training, combined with legal experience constitute a lawyer's legal education. An experienced lawyer may be especially well trained to handle your problem. If he is an unusually able lawyer of proven ability or a specialist, he may charge more than someone not so well known because his services are in great demand.

(3) *The importance, complexity and seriousness of the matter are considerations.* Drawing a simple apartment lease is an altogether different problem from that of drawing a 99-year lease on extremely valuable commercial property, for example.

(4) The *results* that are achieved are also usually a factor in determining a fair fee. Often, as in most accident cases, this may be the most important single factor. On the other hand, attorneys cannot guarantee results in contested matters and (unless they have agreed to a fee based solely on the result) they will expect to be paid regardless of the outcome.

(5) An attorney must consider his *business expenses*. Aside from the fact that a legal education is extremely expensive—usually requiring seven full years of training—most attorneys have many thousands of dollars invested in books and their office. In addition, legal secretaries and other

employees are highly paid. As much as 35% to 50% of a fee may go to defray office and other business expense.

SEEK PREVENTIVE LEGAL ADVICE. An hour of prevention is almost always worth days or weeks of litigation. For example, very few people know the rules for drawing a will. If you attempt to draw your own will and do it imperfectly, your heirs may spend thousands of dollars trying to correct your errors. If you buy a printed form lease or form contract for 10¢ and litigation develops because that form was not prepared exactly for your situation, the cost of settling or litigating the dispute may be high.

Do you know the difference between joint tenancy and community property as it affects your home or other real estate? Very few people do. Do you understand the importance of recording a homestead and exactly what it means? Have you given any thought to how much your widow or husband will have to pay in death taxes in the event of your death? These are a few of many fields in which a preventive visit to an attorney may save you money. In fact, there is no area of the law where prevention is not much less expensive than "cure."

LET'S BE SPECIFIC. Accidents: In accident cases, attorneys who represent the injured usually agree to a contingent fee. This means that whether the lawyer gets paid for his services or not and, if so, how much, depends upon the amount collected. Usually, the percentage the attorney is paid ranges between 25% and 50%, depending upon many factors, such as the possibility that the suit might be lost altogether or will involve a lengthy trial with only a small, if any, judgment likely. Fees are not set by the court except in special cases (such as a suit by a minor). Fees should, therefore, always be discussed and agreed upon in advance.

Probating your Estate: If you die and leave any real property or any personal property in excess of \$1,000.00, your estate will have to be "probated." The basic fee the attorney for your estate will receive is set by law. The court will award him additional reasonable sums for services such as sale of property, the managing of a business, the filing of tax returns or litigation of any kind. For example, the law sets the following fees for ordinary legal services in connection with the probate of an estate:

<i>Size of Estate</i>	<i>Fee</i>
\$ 1,000	\$ 70.00
10,000	430.00
50,000	1,630.00
150,000	3,630.00

Accidents on the Job: Persons injured while working are almost always covered by industrial accident insurance. If it becomes necessary to retain an attorney to have the matter adjusted or settled by the State Industrial Accident Commission, the Commission Referee will set his fee.

Divorce: Unfortunately, divorces have become almost as frequent as marriages. Lawyers and their clients may agree upon any fee arrangement. However, many women who sue for divorce because of the wrongful conduct of their husbands have no money to pay their attorney. In such cases, the husband may be required to pay the wife's attorney. The judge or one of his assistants (called commissioners) will determine the amount to be paid and, perhaps, order it paid in specified installments. Where the husband has a high earning capacity, or where there is any property involved, or if, for any reason, it appears that an unusual amount of legal work or responsibility is involved, higher fees are usually awarded. In such cases, the husband and his attorney must, of course, agree between themselves as to the fee.

A LAWYER REFERRAL SERVICE IS AVAILABLE. Many associations of lawyers (called "Bar Associations") maintain lists of their members who, as a public service, are willing to consult and advise clients at a special rate (for the first conference only) set by the Bar Association. Anyone who inquires will be advised of the amount of the fee for the first conference and will be given the names of three attorneys from which to choose. If additional legal service is needed, the fee is subject to agreement between the attorney and client and again should be discussed in advance.

CONCLUSION: Many people who need legal help are reluctant to see an attorney because they have heard that legal services are expensive. Actually fees are small in comparison with the potential benefits to be gained or losses to be avoided by seeing an attorney. Often no specific fee can be fixed in advance because cases are different; they require different amounts of time and skills and they involve different amounts of property or money. Your attorney will be pleased to answer your questions on fees at any time and you do not have to proceed unless you think it advisable.

RULES

FOR THE LAWYER REFERRAL SERVICE

Los Angeles County Bar Association

606 So. Olive St., Suite 1212
Los Angeles, Calif. 90014

Adopted by Board of Trustees February 4, 1970
Amended by Board of Trustees December 1, 1971
Amended by Board of Trustees January 26, 1972

RULE I

PURPOSES:

The following shall be the primary and basic purposes of the Lawyer Referral Service of the Los Angeles County Bar Association:

- A. To serve members of the public in the following manner:
 1. To establish procedures whereby a prospective client who can pay a reasonable fee may obtain competent legal representation and advice;
 2. To provide a means whereby any member of the public who has the ability to pay may obtain professional assistance from a lawyer qualified in a particular field or area of the law;
 3. To promote and insure standards of practice through the Service commensurate with the standards of practice in the community.
- B. To serve members of the legal profession by making available to lawyers consulting services of members of the profession who are experienced in particular fields and are qualified as such pursuant to the Rules governing the Lawyer Referral Service of the Los Angeles County Bar Association.

RULE II

DEFINITION OF TERMS:

For convenience, the following terms shall be used from time to time in these Rules to designate the following:

- A. The term "Association" is employed herein to designate the Los Angeles County Bar Association;
- B. The term "Applicant" to designate each lawyer or layman who shall apply to the Association for reference to a lawyer;
- C. The term "Registrant" to designate each lawyer who has applied for registration or whose name is registered for reference through the Lawyer Referral Service;
- D. The term "Service" to designate the Lawyer Referral Service of the Los Angeles County Bar Association;
- E. The term "Committee" shall be used to designate the Lawyer Referral Service Committee of the Los Angeles County Bar Association.

RULE III

ADMINISTRATION OF SERVICES:

- A. **Registration Fee:** Each registrant under the Service shall pay to the Association an annual registration fee of \$15.00. The first annual registration fee shall accompany each applicant's "Registration Form" for original registration under the Service. Each year thereafter, so long as he shall continue registered under the Service, each applicant shall pay, on or before the anniversary date of his original registration, the annual registration fee. The Association may, by order of a majority of the members of its Board of Trustees, refund all or any part of any registration fee; but the Association shall never, under any circumstances, be obligated to return or refund all or any part of any registration fee.

All fees received by the Association from registrants under the Service shall be placed in a separate Association fund designated as the "Lawyer Referral Service Fund." Said fund shall be used and expended for the sole purpose of maintaining, operating and publicizing the Lawyer Referral Service.

- B. **Panel:** There shall be maintained at the office of the Association card files of three separate panels as follows:
 1. A first panel (blue cards) to be used exclusively for references in response to inquiries from members of

the profession, which shall contain the name of each lawyer who shall register as experienced in a field in which he is qualified to advise other lawyers who lack experience in such field;

2. A second panel (salmon cards) to be used exclusively for references in response to inquiries from those lay-applicants of small means who must have a lawyer willing to serve them for a relatively small fee, which shall contain the names of those lawyers who shall register as being willing to handle relatively small matters including those involving litigation, wherein the total fee is estimated to be as low as \$75.00 either by reason of the nature of the matters themselves or by reason of the inability of the clients to pay larger fees, and may not include provision for a cash payment for the initial interview in certain situations where a fee could reasonably be expected to be payable by the other party (as in divorce actions) or payable out of a fund to be secured or protected (as in probate matters) or where a contingency fee arrangement could be made according to the established practices of lawyers in this community, and used under provisions of written agreement approved by the Board of Trustees with outside agencies, e.g., Legal Aid;
3. A third panel (white cards) to be used exclusively for references in response to the inquiries of all other lay-applicants, which shall contain the names of all lawyers who shall register for lay references pursuant to these rules.

Each panel shall be classified according to fields of practice represented, and sub-classified according to location of registrants' offices and foreign languages spoken by the registrant, as disclosed by the "Registration Form" filed by each registrant.

Any registrant so desiring shall be permitted to withdraw his registration from the Service, or from any panel thereof, or from any field of the practice classified therein, at any time upon five days' written notice to the Association.

A roster of all registrants under the Service, listed in alphabetical order, shall be compiled and kept at the office of the Association. Opposite the name of each lawyer in such roster shall appear a list of the fields of the practice under which he is registered.

Subject to sub-paragraph F-1 of this Rule III, the various cards comprising the three panels shall be compiled from the information given on executed "Registration Forms" received at the office of the Association. Such cards shall be filed in the appropriate panel under the proper field of the practice, in the same order in which the "Registration Forms" are received.

No lawyer shall be registered in any panel maintained by the Service under more than three fields of the practice of the law, in addition to registration as a trier of contested cases in one or more of such fields; provided, however, that nothing herein contained shall prevent any lawyer from being in more than one of the three reference panels described in this Rule III.

C. Activities and Responsibilities of the Lawyer Referral Service Committee:

1. The Committee shall be charged with the duty and responsibility of assisting in the administration of the Service and consulting with and advising the Board of Trustees of the Los Angeles County Bar Association regarding any and all matters concerned with or regarding the Service;
2. The Committee shall also have the duty and responsibility of regularly reviewing these Rules, and subject to the approval of the Board of Trustees, making such revisions and additions thereto as may

from time to time be necessary or proper to further effectuate or evidence the purpose and intent of these Rules and the Service.

3. During the period of his service a member of the Committee is ineligible to serve or be considered on any panel.

D. Applications of and from Members of the Public:

1. Upon written or oral application by any laymen to the offices of the Association, the following procedure will be used:
 - a. The names of three registrants first in order under the field of practice indicated by the applicant's inquiry, together with their respective office addresses and telephone numbers, shall be given to such applicant. If the names of fewer than three lawyers appear registered under the particular field indicated, then the names of all lawyers registered under that field shall be given to the applicant;
 - b. Such information shall be given in writing upon a form "Letter of Information" to be provided by the Association. A copy of each "Letter of Information" shall be kept and filed chronologically in the office of the Association;
 - c. The panel cards of the registrants whose names appear on each successive "Letter of Information" shall be placed forthwith in inverse order to the rear of all other panel cards under that particular field of practice. And the names of the registrants whose cards are next in order under that field shall be furnished to the next applicant seeking similar service—it being the intention to rotate in succession the names of registrants under each field of practice, so that no registrant's name shall appear a second time at the head of the names listed on a "Letter of Information" until after the name of every other registrant under that particular field of practice shall have appeared first on a "Letter of Information;"

Whenever an applicant shall request reference to a lawyer maintaining offices in a specified neighborhood, community, town or city within Los Angeles County, the names of registrants first in order under the field of practice indicated, who maintain offices in the locality specified by the applicant, shall be given as provided in sections (a) and (b) hereof; and the names of such registrants shall be rotated in the manner provided in section (c) hereof.

2. Persons seeking legal advice who are referred by the office of the Association to registrants in the Lawyer Referral Service are to be given their first conference by the attorney to whom such person is referred, and by no other attorney. If the attorney to whom reference is made is unable to serve said client, the attorney shall advise the client to choose another lawyer from the list furnished by the Association, or re-refer such person to the office of the Association.

E. Applications of and from Lawyers Re Consulting Services:

Upon written or oral application by any member of the profession to the office of the Association, there shall be made available to such applicant the names, office addresses and telephone numbers of five registrants under any field of the practice in which the applicant may be interested.

Such information may be given to lawyer-applicants by telephone, provided the information thus given be confirmed in writing upon a form "Letter of Informa-

tion (for Lawyers only)" to be provided by the Association. In all instances where such information is furnished to lawyer-applicants by telephone, the confirmation "Letter of Information" shall be mailed to such applicant as soon as possible thereafter and in all events on the same day. A copy of each "Letter of Information (for Lawyers only)" issued shall be kept and filed chronologically in the office of the Association.

The panel cards of those registered under any particular field of practice shall be rotated in succession so that no registrant's name shall appear a second time at the head of the names listed on a "Letter of Information (for Lawyers only)" until after the name of every other registrant under that particular field of practice shall have appeared first on a "Letter of Information (for Lawyers only)."

F. Miscellaneous Administrative and Procedural Provisions:

1. The Association reserves the right, by order of a majority of the members of its Board of Trustees, to reject any application for registration, or to remove the name of any registrant from any panel at any time. The Executive Director of the Association shall promptly notify by certified mail each registrant whose application for registration shall be rejected or whose name shall be removed from any panel.
2. The Association reserves the right to decline to make the facilities of the Service available to any person.
3. Each registrant shall keep a record of the name of each client referred to him through the Service, the approximate date of the reference, the general nature of the matter referred, and the total fee received, and shall report such information to the Association upon written request therefor.
4. Each registrant shall be guided, governed and bound by the Canons of Professional Ethics of the American Bar Association.
5. No lawyer shall in any event be registered under the Service unless and until he shall warrant that he is a member in good standing of The State Bar of California and the Los Angeles County Bar Association engaged in active practice of the law in Los Angeles County and shall agree, in consideration of the Association's maintenance of the Referral Service described in these rules, that the information contained in the "Registration Form" may be furnished to both professional and lay applicants in the operation of the Service by the Association; that his name may be classified in the Service as the Board of Trustees of the Association shall direct; that his name may be withdrawn from any or all classifications of the Service at any time, in the discretion of a majority of the members of the Board of Trustees, provided that he himself shall be permitted to withdraw his registration from any or all classifications of the Service at any time upon five (5) days' written notice to the Association; that so long as he shall continue registered under the Service he will pay to the Association each year, on or before the anniversary date of his original registration, the annual registration fee; that he will abide by all rules of the Service which may be promulgated by the Association; and that he will in no event hold or claim to hold the Association or any officer, trustee, member or employee thereof to any liability whatever in connection with the operation of the Service or the use of information contained in the "Registration Form."
6. Each registrant shall maintain a minimum amount of errors and omissions insurance in the amount of \$100,000 for each claim and \$300,000 for each

occurrence or such other amounts as may be fixed and determined by the Committee, or show equivalent financial responsibility and agree to indemnify and hold harmless the Los Angeles County Bar Association, the Committee and its members, and all officers, agents and employees of the Association of and from any and all actions, causes of action, liabilities, claims, demands and expenses, including reasonable attorney's fees which may arise or be incurred as a result or by reason of any and all referrals of clients to the attorney through the Service.

7. Each registrant, prior to being registered on the Lawyers Referral panel, shall complete an application in a form prepared by the Association as the same may be revised and amended from time to time.

RULE IV

LAWYER REFERRAL PANELS FOR THE GENERAL PUBLIC:

A. Group 1:

Administrative Law (excluding those categories of Administrative Law specifically set forth herein)

Admiralty

Aliens

- (a) Immigration
- (b) Naturalization

Civil Rights

Condemnation Proceedings

Construction Industry Law

- (a) Contracts
- (b) Collections and Mechanic's Liens

Copyrights and Related Matters

Corporation and Business Law

Debtor-Creditor Relations

- (a) Creditor's and Debtor's Remedies
- (b) Bankruptcy, Receivership and Reorganizations

Domestic Relations

Entertainment Law

Government Contracts

International Law

Insurance Law (Other than Personal Injury)

Labor Law

- (a) Management
- (b) Union
- (c) Employee

Landlord and Tenant

Municipal Law

Natural Resources and Public Lands

- (a) Gas and Oil
- (b) Mining
- (c) Water Rights
- (d) Public Lands

Patent, Trademark and Trade Secrets Law

Psychiatric Dept. of Superior Court

Public Utilities

Real Property Law

- (a) Purchase, Sales and Financing
- (b) Planning and Zoning

Social Security and Veterans' Matters

Taxation (State particular field)

Workmen's Compensation

- (a) Prosecution
- (b) Defense

B. Group 2:

Adoptions
 Appellate Practice
 Anti-Trust and Trade Regulation
 Commercial Litigation (Excluding matters involving Personal Injury, Divorce, Criminal Law and Collection Work)
 Criminal Law
 Personal Injury and Property Damage Law
 (a) Insurance Contracts
 (b) Prosecution
 (c) Defense
 Probate, Conservatorship and Guardianship Law
 Selective Services Cases
 Wills, Trusts and Estate Planning

RULE V**QUALIFICATION FOR LAWYER REFERRAL PANELS FOR THE GENERAL PUBLIC:**

In order to qualify for membership on the lawyer referral panels described more fully in Rule IV hereof, each attorney applicant must meet the following minimum standards:

A. Group 1 panels:

Each lawyer, in order to become a member of the panel set forth in Group 1, shall have completed either 5 matters which do not require appearance before a judicial or quasi-judicial tribunal or shall have completed 5 actions before a judicial or quasi-judicial tribunal as the case may be.

B. Group 2 panels:

Adoptions—Completion of one agency and one private adoption.

Appellate Practice—Two completed appeals in each sub-category, to wit, Federal and State.

Anti-Trust and Trade Regulation—Five matters, not necessarily to completion.

Commercial Litigation (Excluding matters involving Personal Injury, Divorce, Criminal Law and Collection Work)—Five years experience in the field.

Criminal Law—Five completed matters in each sub-category, which completed matters must include, where applicable, at least one jury trial, a felony and misdemeanor defense, and a drunk driving case.

Personal Injury and Property Damage Law—Five matters, including one completed jury trial.

Probate, Conservatorship and Guardianship Law—One completed guardianship or conservatorship matter, and two completed probates.

Selective Service Cases—Five matters, including two trials.

Wills, Trusts and Estate Planning—Five wills or estate plans with at least one Trust, either *inter vivos* or testamentary.

RULE VI**QUALIFICATION FOR LAWYER REFERRAL PANEL FOR MEMBERS OF THE BAR:**

Any lawyer desiring to register as a person experienced in a field of law and with whom other lawyers may consult shall only be eligible to apply for inclusion on such panel if such attorney applicant shall have practiced not less than five years in the field of law in which said attorney desires registration.

RULE VII**ATTORNEYS' FEES:****A. Fees to be Charged Members of the Public:**

1. No lawyer shall be registered in the panel of those lawyers willing to serve laymen in a particular field, unless such registrant shall agree to render professional services for each layman referred by the Service upon the following fee basis:
 - a. A maximum charge of \$15.00, payable in advance, to cover a first conference consuming not more than one-half hour;
 - b. A maximum charge of \$25.00, payable in advance, to cover a first conference consuming more than one-half hour but not in excess of one hour;
 - c. A maximum charge of \$25.00, payable in advance, for preliminary consideration of a matter submitted through the mail;
 - d. With the understanding that the charges above specified cover conference and advice only, and do not include the preparation of letters or any legal papers;
 - e. With the further understanding that all compensation for any further services will be subject to written agreement with the client;
 - f. With the further understanding that in all such matters wherein compensation is contingent upon a recovery, the total fees will in no event exceed 40% of the total gross recovery; and
 - g. With the further understanding that if any dispute over fees should arise between the lawyer and any client referred by the Service, and the client so requests, such dispute will be submitted to the Arbitration Committee of the Association for final determination.
2. No lawyer shall be registered in the panel of those lawyers willing to serve persons of small means (salmon cards), unless such registrant shall make, in addition to the agreements provided in Rule VII, subpart 1 with respect to fees, the further agreement to handle matters (including those involving litigation) referred to him through the Service, wherein the total fee is estimated to be as low as \$75.00 either by reason of the nature of the matters themselves or by reason of the inability of the clients to pay larger fees, and may not include provision for a cash payment for the initial interview in certain situations where a fee could reasonably be expected to be payable by the other party (as in divorce actions) or payable out of a fund to be secured or protected (as in probate matters) or where a contingency fee arrangement could be made according to the estimated practices of lawyers in this community.

B. Fees to be Charged Members of the Profession:

There shall be no fees fixed by the Association or the Committee to be charged by a lawyer qualifying as a person experienced in a field of law with whom other lawyers may consult pursuant to the terms and provisions of these rules, nor shall any other limitation of any kind or nature whatsoever be placed thereon.

REGISTRATION FORM
OF
LAWYER REFERRAL SERVICE

LOS ANGELES COUNTY BAR ASSOCIATION

1212 City National Bank Building
606 South Olive Street
Los Angeles, California 90014
624-8571

TO EVERY MEMBER OF THE LOS ANGELES COUNTY BAR ASSOCIATION:

The purpose of this communication is to invite you to register in the **Lawyer Referral Service**. The Service, first one in the country, was established to refer persons who do not know a lawyer to a member of the profession and to assist attorneys who wish to consult other attorneys in highly specialized fields of law.

Twenty-five years of experience with the Service have demonstrated its usefulness both to the public and to the members of the profession.

The annual registration fee is \$15. All fees received will be spent for purposes of maintaining, operating and publicizing the Service. The Committee on Professional Ethics of the American Bar Association has approved the propriety of publicizing the Service by means of newspaper advertising and other commonly employed media of publicity.

There shall be maintained at the office of the Association three card indexes, as follows:

- (a) One index is compiled from the information given under items (16), (17), (18), (20), and (21) of this registration form and used exclusively for references in response to inquiries from those lay applicants of small means who seek a lawyer willing to serve them for a relatively small fee; and
- (b) A second index used in handling the inquiries of all other lay applicants, and compiled from the information given under items (16), (17), (18), and (20);
- (c) A third index used exclusively for references in response to inquiries from members of the profession and compiled from the information given under item (19).

For obvious reasons, registration of any one lawyer is limited to three fields of practice. The mechanics for the operation of the Service are governed by a set of Rules approved by the Board of Trustees of the Los Angeles County Bar Association, a copy of which will be forwarded to you upon request. The system gives the lay-applicant the widest practicable latitude in choosing his own lawyer, and at the same time provides an equitable method of rotating the references among all registrants.

It is the hope of the Los Angeles County Bar Association that the **Lawyer Referral Service** shall be an ever growing builder of good will for the profession.

If you wish to register fill out this form and mail it to the office of the Los Angeles County Bar Association with your check in amount of \$15 which will pay your registration fee for twelve months. At the end of that period you will be billed for the following twelve months.

Respectfully submitted,

STANLEY L. JOHNSON

Executive Director

Los Angeles County Bar Association

LAWYER REFERRAL SERVICE
OF THE
LOS ANGELES COUNTY BAR ASSOCIATION
REGISTRATION FORM
(Please type or print)

- (1) _____
(Surname) (Given Name)
- (2) _____
(Office Address, Building and Room Number)
- (3) _____
(City) (Zip Code) (Telephone Number)
- (4) _____
(Name of Firm) – (Member, Associate or Employee)
- (5) Date of Birth _____ Place of Birth _____
- (6) Preparatory Education _____
- (7) College Education _____
- (8) Law School or Law Office Education _____
- (9) _____
(Date admitted in California) – (After Examination or upon Motion)
- (10) Admitted also to practice before _____

- (11) Engaged in active practice in Los Angeles County since year _____
- (12) Has your practice consisted largely of trial work? _____
Of office work? _____ or both? _____
- (13) Please list the names and addresses of three Attorneys or Judges who have some knowledge of the character of your professional work and ability:

- (14) Name any other jurisdiction in which you have been admitted and in whose laws you are qualified to advise:

- (15) List any foreign languages you are able to speak: _____

- (16) If your practice is limited exclusively to a particular field, please describe your specialty: _____

(17) QUALIFICATION FOR LAWYER REFERRAL PANELS FOR THE GENERAL PUBLIC:

In order to qualify for membership on the lawyer referral panels described below, each attorney must meet the following minimum standards:

A. Group 1 panels:

Each lawyer, in order to become a member of the panel set forth in Group 1, shall have completed either 5 matters which do not require appearance before a judicial or quasi-judicial tribunal or shall have completed 5 actions before a judicial or quasi-judicial tribunal as the case may be.

B. Group 2 panels:

Adoptions—Completion of one agency and one private adoption.

Appellate Practice—Two completed appeals in each sub-category, to wit, Federal and State.

Anti-Trust and Trade Regulation—Five matters, not necessarily to completion.

Commercial Litigation (Excluding matters involving Personal Injury, Divorce, Criminal Law and Collection Work)—Five years experience in the field.

Criminal Law—Five completed matters in each sub-category, which completed matters must include, where applicable, at least one jury trial, a felony and misdemeanor defense, and a drunk driving case.

Personal Injury and Property Damage Law—Five matters, including one completed jury trial.

Probate, Conservatorship and Guardianship Law—One completed guardianship or conservatorship matter, and two completed probates.

Selective Service Cases—Five matters, including two trials.

Wills, Trusts and Estate Planning—Five wills or estate plans with at least one Trust, either *inter vivos* or testamentary.

LAWYER REFERRAL PANELS FOR THE GENERAL PUBLIC:

Check from the following the particular fields (not exceeding three) under which you are qualified to be listed in the Lawyer Referral Service for reference on inquiries from laymen:

A. Group 1:

- | | | |
|------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------|------------------------------------------------------------------|
| <input type="checkbox"/> Administrative Law (excluding those categories of Administrative Law specifically set forth herein) | <input type="checkbox"/> Domestic Relations | <input type="checkbox"/> Patent, Trademark and Trade Secrets Law |
| <input type="checkbox"/> Admiralty | <input type="checkbox"/> Entertainment Law | <input type="checkbox"/> Psychiatric Dept. of Superior Court |
| <input type="checkbox"/> Aliens | <input type="checkbox"/> Government Contracts | <input type="checkbox"/> Public Utilities |
| <input type="checkbox"/> (a) Immigration | <input type="checkbox"/> International Law | <input type="checkbox"/> Real Property Law |
| <input type="checkbox"/> (b) Naturalization | <input type="checkbox"/> Insurance Law (Other than Personal Injury) | <input type="checkbox"/> (a) Purchase, Sales and Financing |
| <input type="checkbox"/> Civil Rights | <input type="checkbox"/> Labor Law | <input type="checkbox"/> (b) Planning and Zoning |
| <input type="checkbox"/> Condemnation Proceedings | <input type="checkbox"/> (a) Management | <input type="checkbox"/> Social Security and Veterans' Matters |
| <input type="checkbox"/> Construction Industry Law | <input type="checkbox"/> (b) Union | <input type="checkbox"/> Taxation (State particular field) |
| <input type="checkbox"/> (a) Contracts | <input type="checkbox"/> (c) Employee | <input type="checkbox"/> Workmen's Compensation |
| <input type="checkbox"/> (b) Collections and Mechanic's Leins | <input type="checkbox"/> Landlord and Tenant | <input type="checkbox"/> (a) Prosecution |
| <input type="checkbox"/> Copyrights and Related Matters | <input type="checkbox"/> Municipal Law | <input type="checkbox"/> (b) Defense |
| <input type="checkbox"/> Corporation and Business Law | <input type="checkbox"/> Natural Resources and Public Lands | |
| <input type="checkbox"/> Debtor-Creditor Relations | <input type="checkbox"/> (a) Gas and Oil | |
| <input type="checkbox"/> (a) Creditor's and Debtor's Remedies | <input type="checkbox"/> (b) Mining | |
| <input type="checkbox"/> (b) Bankruptcy, Receivership and Reorganizations | <input type="checkbox"/> (c) Water Rights | |
| | <input type="checkbox"/> (d) Public Lands | |

B. Group 2:

- | | |
|-----------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------|
| <input type="checkbox"/> Adoptions | <input type="checkbox"/> Personal Injury and Property Damage Law |
| <input type="checkbox"/> Appellate Practice | <input type="checkbox"/> (a) Insurance Contracts |
| <input type="checkbox"/> Anti-Trust and Trade Regulation | <input type="checkbox"/> (b) Prosecution |
| <input type="checkbox"/> Commercial Litigation (excluding matters involving Personal Injury, Divorce, Criminal Law and Collection Work) | <input type="checkbox"/> (c) Defense |
| <input type="checkbox"/> Criminal Law | <input type="checkbox"/> Probate, Conservatorship and Guardianship Law |
| | <input type="checkbox"/> Selective Service Cases |
| | <input type="checkbox"/> Wills, Trusts and Estate Planning |

- (18) Please specify whether you wish to be registered as a trier of contested cases (in both State and Federal Courts) arising in the field or fields you have named:

- (19) Do not register in this section unless you have practiced for over five years and are willing to consult with and advise other members of the profession in the fields you list below.

List each field (not exceeding three) in which your experience has been such that you feel qualified to advise other attorneys in such field. State the number of years you have practiced in each field.

Field of Law

*Years Practiced in
this field*

1. _____
2. _____
3. _____

- (20) By registering in the **Lawyer Referral Service** you have agreed to abide by the following rules concerning fees:

- (I) A maximum charge of fifteen dollars, payable in advance, to cover a first conference consuming not more than one-half hour;
- (II) A maximum charge of twenty-five dollars to cover a first conference consuming more than one-half hour but not in excess of one hour;
- (III) A maximum charge of twenty-five dollars payable in advance for preliminary consideration of a matter submitted through the mail.

The rule as to charges is subject to the following qualifications:

- (a) The conference charges above specified in (I) and (II) cover conference and advice only, and do not include the preparation of letters or any legal papers;
- (b) All of your compensation for any further services will be subject to written agreement with the client;
- (c) In all such matters wherein your compensation is contingent upon a recovery, your total fees will in no event exceed 40% of the total or gross recovery; and
- (d) If any dispute over fees should arise between you and any client referred by the **Lawyer Referral Service**, and the client so requests, such dispute will be submitted to the Arbitration Committee of the Los Angeles County Bar Association for final determination.

Initial here signifying that you have read the foregoing _____

- (21) Are you willing to have referred to you relatively small matters, including those involving litigation wherein the total fee is estimated to be as low as \$75 either by reason of the nature of the matters themselves or by reason of the inability of the clients to pay larger fees, and may not include provisions for a cash payment for the initial interview?

Yes _____ No _____

- (22) In accordance with Rule III, Part F, No. 6 of the Service, I currently have errors and omissions insurance in force in the amount of _____ for each claim and _____ each occurrence. NOTE: Limits of \$100,000/300,000 are the current minimum limits set by the Committee.

The undersigned certifies that he is a member in good standing of the State Bar of California and is now engaged in the active practice of the law in Los Angeles County. In consideration of the Los Angeles County Bar Association's maintenance of the **Lawyer Referral Service**, the undersigned agrees: That the information herein contained may be furnished to both professional and lay applicants in the operation of the **Lawyer Referral Service** by the Los Angeles County Bar Association; that the name of the undersigned may be classified in the Service as the Board of Trustees of the Association shall direct; that the name of the undersigned may be withdrawn from any or all classifications of the Service at any time, in the discretion of a majority of the members of the Board of Trustees, provided the undersigned shall be permitted to withdraw his registration from any or all classifications of the Service at any time upon five days' written notice to the Association; that the undersigned will abide by all rules of the Service now in force and which may be promulgated by the Association; that so long as he shall continue registered under the Service he shall pay to the Association each year, on or before the anniversary date of his original registration, the annual registration fee; and that the undersigned will in no event hold or claim to hold the Association or any officer, trustee, member or employee thereof, to any liability whatever in connection with the use of the information herein contained or the operation of the Service.

Check for \$15 to the order of the Los Angeles County Bar Association is enclosed to cover registration fee for one year from this date.

Date: _____, 19____

(Signature of Attorney)

SHAW, KUHN & THOMAS

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

35 MITCHELL BOULEVARD

SAN RAFAEL, CALIFORNIA 94903

LEONARD SHAW
RICHARD R. KUHN
JOHN RALPH THOMAS, JR.

TELEPHONE
(415) 472-1000

October 30, 1973

United States Senate
Committee on the Judiciary
Washington, D.C. 20510

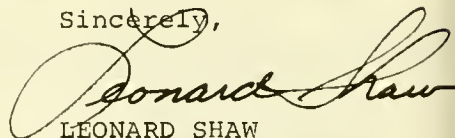
Attention: John V. Tunney, Chairman

Dear Senator:

I find it rather disquieting to receive on October 29th a communication from you soliciting the comments of our Bar Association on a matter as significant as legal fees, and allowing us only 5 business days within which to consider the matter and provide your sub-committee with our views.

Under the circumstances it is not possible for our Association to give this matter the consideration which it obviously deserves. Rather than acting hastily in the matter we find ourselves in the unhappy position of simply having to decline to provide your sub-committee with any views of our Association in this matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Leonard Shaw", written in dark ink.

LEONARD SHAW

LS:egw

PALO ALTO AREA BAR ASSOCIATION

405 Sherman Avenue
Palo Alto, California 94306
November 6, 1973

The Honorable John V. Tunney
United States Senate
Washington, D.C. 20510

Re: Judiciary Subcommittee on the Representation
of Citizen Interests

Dear Senator Tunney:

Thank you for your letter of October 23.

Within the time limitations made necessary by your Subcommittee's timetable our bar association has not been able to put together the coherent reply your inquiry deserves. However, on the basis of the comments I have received from the chairmen of those of our committees most directly concerned with delivery of legal services, and from my own observation of our bar association over several years, I can at least assure you that we wholeheartedly agree with the thesis of your remarks of September 19, 1973. We would, perhaps, go farther: Our profession must respond immediately and effectively to the obvious need for legal services for persons of limited means, and must do so without unwarranted reliance upon government subsidy, if it is to retain its very professionalism.

I take pride in the fact that our bar association has, over the years, put these thoughts into action in a number of ways:

¶ Our own legal aid program, involving voluntary service by every member of our bar association on a rotating basis, far predated the emergence of federally-funded programs under the Office of Economic Opportunity. We continue to donate in-kind services to supplement existing federally-funded programs, and our legal aid committee is and for more than a year has been working out plans for a renewed full-scale volunteer legal aid program if and when federal funding expires.

¶ Our client relations committee has for several years worked actively to mediate and where necessary to arbitrate attorney-client fee disputes. In my experience the committee tends in virtually every case to give the benefit

The Honorable John V. Tunney

-2-

November 6, 1973

of any conceivable doubt to the client. In addition, this committee conducts education programs for members of the bar, stressing the importance of professionalism in fee-setting.

¶ Our lawyer reference service won an American Bar Association award at the time of its renovation to a panel system in 1967, and has been taken as a model of public-service-oriented function by many other bar associations. Nearly 40 percent of our members are lawyer reference service panelists. Our system contemplates that the panel attorney will contribute 30 minutes of consultation time for the initial referral fee of \$10 payable not to the attorney but to the service itself, and many client problems can be resolved within that 30-minute consultation for that small charge.

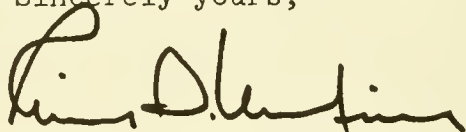
¶ Within the past few years we have rented an office and employed a full-time administrator trained to be able to respond promptly and effectively to questions from members of the public as to the legal professional and means of obtaining services they need in law-related areas.

Beyond these association-wide activities it has been my impression, supported by observations in, and conversations with attorneys from, many legal communities, that attorneys practicing in this area are as individuals unusually sensitive to their professional responsibilities to persons of limited means: As individuals, many of our attorneys are quite active in rendering legal services without compensation or for reduced fees for indigent criminal defendants and through the various civil-rights and civil-liberties organizations.

This essentially self-serving account is submitted to make clear that our bar association supports your Subcommittee's expressed philosophy and would want to help and to be kept informed.

We hope you will call on us.

Sincerely yours,



Richard G. Mansfield
President



**san diego
county bar
association**

1200 THIRD AVENUE, SUITE 414 • SAN DIEGO, CALIFORNIA 92101 • TELEPHONE: 232-6739

November 2, 1973

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Senator John V. Tunney
United States Senate
Washington D. C. 20510

In re: Subcommittee on Representation of
Citizen Interests

Dear Senator Tunney:

Thank you for providing me with a copy of your remarks to the Subcommittee and for your letter of October 23 inviting comments from our Association.

The San Diego County Bar Association has a membership of approximately 1,800. It is a voluntary association. There are 2,100 lawyers practicing in the County. We have an active Legal Aid program and have supported it to the extent of \$30,000 per year.

San Diego was the first city in America to have a private Defender. Defenders Inc. now coordinates the activities of our State, Federal and Appellate Defender organizations. This has enabled us to retain the involvement of the private bar in the criminal justice system, as none of the Defender staffs are large enough to handle all of the cases.

Our Lawyers Referral Service provides the citizens of our City and County with ready access to a lawyer. As you are aware, this functions through a trained staff which takes calls from people in the community with a legal problem. The nature of the difficulty is ascertained and the referral is made to a member of our Association who has been certified to be qualified to practice in the particular field involved. This certification is based on training or experience or both. The client then contacts

Senator John V. Tunney
November 2, 1973
Page Two

the lawyer and for a \$10 fee is entitled to a one-half hour conference. Often, the problem is resolved in this period of time and the client is relieved of the pressure for this nominal fee. If not, the matter can be explained and the client has an opportunity to determine whether the cost of proceeding is feasible vis-a-vis the prospects of recovery. The client can also determine whether this is the lawyer he wants to have handle his case.

We believe that this service, which is available in most cities in California, has done a great deal to alleviate complaints regarding accessibility of lawyers.

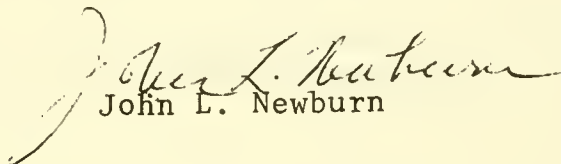
As soon as we became aware of the Virginia case on Minimum Fee Schedules and of the attitude of the Justice Department regarding Minimum Fee Schedules, we abolished ours. We have advised all lawyers in our Association of this fact so that there is no longer any pressure on any lawyer here to charge a fee based upon an artificial schedule. In fact, our schedule had always been advisory only and was more honored in its breach than in its observance by our members.

I believe that the answer to most of the problems presented by your statement can best be handled by the local Bar Associations. I know of the interest of the American Bar Association in your deliberations and if the A.B.A. could coordinate the suggestions which come out of your hearings, the local Bars will assist in their implementation. I have not had occasion during my term of office to receive a call from an individual saying that he or she could not find legal assistance. If I ever do, I am confident that I can find an attorney who will accept the matter and pursue it until it is resolved. The difficulty is, in my opinion, a lack of understanding by the general public of the lawyer and his function in society. We are attempting to alleviate this lack of understanding through an active public relations campaign which continues on a year-round basis. Using radio, television, the newspapers, magazines, speakers bureaus and every other news media available, we have tried to help the public know what is available to them in the area of legal services.

Senator John V. Tunney
November 2, 1973
Page Three

I hope these observations will be of some benefit to you. Should you have any further questions about our Association, I hope you will not hesitate to contact me.

Very truly yours,


John L. Newburn

JLN:11g

THOMAS A. LANG
ATTORNEY AT LAW
608 SOUTH BROADWAY
SANTA MARIA, CALIFORNIA 93454
WALNUT 2-1507

October 30, 1973

The Honorable John V. Tunney
U. S. Senate
Committee on the Judiciary
Subcommittee on Representation
of Citizen Interests
Washington, D.C. 20510

Dear Senator Tunney:

Your letter of October 23, 1973 to Mr. Cox was referred to me because I am president of the Santa Maria-Lompoc Bar Assn. In reply, I present the prevailing view of attorneys who practice law for ordinary clients, not government or big business.

There are twice as many attorneys in this community as there should be for each to earn an average income comparable to a teacher's. Many wives are working at anything they can find.

I came from a poverty environment, worked in a legal aid office, was a deputy DA and a city attorney, and have worked as a sole practitioner for 20 years. I have a strong interest in government and people. You may find my views interesting even if not acceptable by you and your subcommittee.

About 160 million people cannot or do not hire attorneys. The majority of attorneys in California earn less than \$6,200 a year, excluding attorneys working for government, big corporations and attorneys with multi-generation connections with wealthy property owners.

Legislators are not actually attorneys and have no understanding of the practice of the law. Schools promise large salaries to lure students, then flood the streets with unemployable attorneys. Large bar associations are dominated by rich attorneys who live in the same ivory towers as do the law professors.

In a thousand little ways, the legislative bodies have taken away the income of attorneys so lawyers can no longer afford to handle cases free for those who cannot afford to pay. Non-lawyers in free competition finished the degradation of the legal profession.

Senator John V. Tunney
 October 30, 1973
 Page 2

I teach business law, real estate law and real estate finance to night classes at our local college. Preventive law is unwelcome, uninteresting and unperceived; law itself is a lifetime mystery to most Americans.

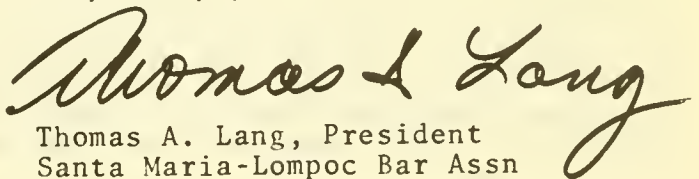
Lawyer's fixed fees are illegal, and the legal profession has no union to protect itself. The public has no means to protect itself from lawyers.

The Johnson administration set up federally-funded offices of imported attorneys and staffs to "help the poor." Instead of handling the real legal problems of the poor, the elaborate local CRLA office (four attorneys plus staff of seven or more) has always sought headlines and excitement by trying to change the law. They have been picketed by the poor.

Shocked by denial of legal aid to frustrated, deserving poor, private attorneys tried to get CRLA funds cut off. Governor Reagan encouraged the substitution of a Judicare type program hoping to finance it with private capital. Despite the Governor's veto, the bureaucracy justified CRLA's existence insisting CRLA was helping the poor. They didn't. They still don't. They won't solve the common, messy problems of the poor. They still won't handle marriage dissolutions and bankruptcies, two areas where an attorney can solve a certain kind of problem very common to the poor.

My conclusion is that Congress should stop subsidizing attorneys. If you won't do that, you should specify what kinds of legal problems will be solved free and let people have their attorney fees fixed by statute and paid for by the government while letting the client select his own attorney along the concept of Judicare.

Very truly yours,


 Thomas A. Lang, President
 Santa Maria-Lompoc Bar Assn

TAL/d

cc: James E. Dixon, Executive Committee
 Conference of State Bar Delegates

SONOMA COUNTY BAR ASSOCIATION

POST OFFICE BOX 1148

SANTA ROSA, CALIFORNIA 95402

November 6, 1973

Honorable John V. Tunney
Chairman, Subcommittee on Representation
of Citizen Interests
Committee on the Judiciary
Washington, D.C. 20510

Re: Senator Tunney letter, October 23, 1973, to
Sonoma County Bar Association, California

Dear Senator Tunney:

I wish to acknowledge receipt of your letter of October 23, 1973 with the enclosure of your opening remarks of September 19, 1973 at your Subcommittee meeting on Representation of Citizen Interests.

I am certain that you are aware that Sonoma County is a mixed community, namely, agricultural and urban. Sonoma County Bar Association has initiated here, in this area of relatively rapid growth, a legal aid society and lawyers' reference service which is presently functioning and contributing to society in answer to many of the problems that you have raised in your opening remarks referenced above.

While we do not claim to have solved all the problems which your committee is studying, we do feel we have taken major steps in the last few years to correct some obvious deficiencies which have existed in the past. It is true, there is an area of society which the California Rural Legal Assistance was not interested in supporting or did not have sufficient funds to support for legal services, and we hope we have breached that gap by providing a viable legal aid service here in Sonoma County. I do know that for approximately three months when the OEO funds for CRLA were cut off in Sonoma County, that we were able to take over their cases by referral and handle them in an expeditious manner.

Not knowing exactly what your committee would like to know about our problems here in Sonoma County, I can merely state that we have recognized the need and are attempting to satisfy that need within the community. This program is being financed by the Sonoma County Bar Association with the only assistance from the United Way, Lawyers' Wives of Sonoma County and staffing and offices provided by Lawyers' Reference Service of Sonoma County. Records and Statistics could be made available upon request for their activities this past year.

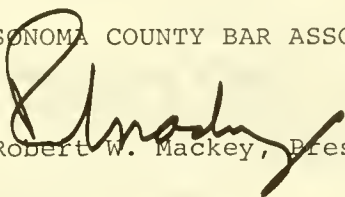
Honorable John V. Tunney
November 6, 1973
Page Two

The practicing attorney in Sonoma County is not a "corporate attorney" but rather more in the category of a small-town attorney with most firms ranging in size from sole practitioners to the largest with approximately 12 or 13 attorneys. I would guess that all of these firms do pro bono publico work, whether intentional or not, as is the experience of many practicing attorneys.

I am sorry that a more definitive presentation could not be made in reply to your letter of the 23rd. However, we have not had an opportunity to have our meeting of our Bar Association since receipt of it and the response is due by November 6. I trust that some of our comments may be of assistance.

Very truly yours,

SONOMA COUNTY BAR ASSOCIATION



Robert W. Mackey, President

RWM/bg

Southwest Los Angeles Bar Association

LOS ANGELES, CALIFORNIA

OFFICE OF:

November 2, 1973

PRESIDENT - Past

JACK C. FELTHOUSE
~~4055 Buchanan Rd. Suite 106~~
~~LOS ANGELES, CALIFORNIA 90008~~
~~200-6463~~

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GERALD WINERMAN

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SECRETARY

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 5455 WILSHIRE BLVD. SUITE 1500
 LOS ANGELES, CALIFORNIA 90036
 937-2100

TREASURER

RUSSELL K. KANE

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The Hon. John V. Tunney
 United States Senate
 Committee on the Judiciary,
 Subcommittee on Representation of
 Citizen Interests,
 Washington, D. C. 20510

Dear Senator Tunney:

Your letter addressed to Ms. Shirley A. Schuster, President, Southwest Los Angeles Bar Association, dated October 23, 1973 was referred to me for answer.

I read your opening remarks of September 19, 1973 and while I admit many of the things you said are true I must confess that I totally disagree with you in some of your other statements.

I am one of the 38% of attorneys who is a sole practitioner representing primarily middle class clients. I believe that attorneys who have similar practices to mine have expertise in dealing with persons who are either totally without funds to hire an attorney or who have limited funds for that purpose.

To my knowledge we are never called to testify before any committee or subcommittee to give our opinions relative to the issues mentioned in your opening remarks.

An obvious example of this situation is that in California minimum fee schedules were established as a guide so that attorneys could show


November 2, 1973

Page 2

clients what they would have to pay before the service was rendered. They were designed to prevent the practice of "socking it to the client." I totally disagree with the position of the Virginia Courts in this matter.

I, as well as several other members of the above association would be willing to meet with you or your staff for the purpose of working out realistic workable solutions to the problems you have referred to.

Respectfully yours,


Jack C. Felthouse,
Past President of Southwest
Los Angeles Bar Association

dm

cc Shirley A. Schuster, President

LOEBL, BRINGGOLD & PECK
ATTORNEYS AT LAW
2580 EAST MAIN STREET
VENTURA, CALIFORNIA 93003

JAMES D LOEBL
BRUCE D BRINGGOLD
WILLIAM L PECK
WILLIAM BRACKEN PARKER

AREA CODE 805
TELEPHONE 648-3303

November 1, 1973

The Honorable John V. Tunney, Chairman
Judiciary Subcommittee on the Representation
of Citizen Interests
United States Senate
Committee on the Judiciary
Washington, D. C. 20510

Dear Senator Tunney:

I am the chairman of the Lawyers Reference Service Committee for the Ventura County (California) Bar Association. I am also a past president of the organization. I am replying to your letter to Loyal D. Frazier of October 23 inviting comments on the hearings which began on September 19.

The Ventura County Bar Association abolished its minimum fee schedule in 1972 because we felt that while it was helpful particularly to the young lawyer whowere seeking guidance in setting reasonable fees that it could easily be considered in violation of Federal Anti-Trust Laws. Our Bar Association now has no suggested schedule, and fees are an individual responsibility of each attorney. I might add our schedule was never enforced but was simply suggested to the attorneys.

We are in the process of redoing our Lawyers Reference Service in the County. The Lawyers Reference Service has in the past been a function of the Legal Aid Association; however, the Bar Association itself has taken it over and a new format hopefully can be presented to the general membership in the spring. We have studied plans of several other counties in California in order to provide the names of attorneys specializing in most areas of the law to the general public who does not know how to seek an attorney.

LCE3L, BRINGGOLD & PECK
ATTORNEYS AT LAW

The Honorable John V. Tunney
November 1, 1973
Page 2

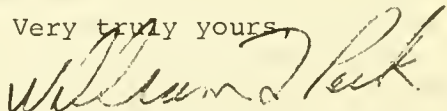
Our Legal Aid Association has done about 15 percent fewer cases this year as a result of the anticipated cutbacks or even dismantling of the entire program which took place in April and May. Since that time OEO funding has been restored and coupled with revenue sharing the Legal Aid Association is expanding its services once again. Even with the expansion, however, indigent persons have been unable to get sufficient counseling in domestic relations or in bankruptcies.

In addition to the Legal Aid Association, we have a system of free clinics which operate in the communities of Ventura, Oxnard, and Simi Valley. These are associations of attorneys, doctors, and other volunteers who provide rudimentary services in the evening time. These consist of consultations and assistance with legal documents; however, there is no formal court representation.

There have been various corporations formed to provide legal services to middle-income people who pay a set amount each month and are entitled to certain services. The State Bar of California has set up such a corporation and is soliciting membership in this plan.

There is no question that there is a great deal to be done in providing adequate legal representation to the average American citizen. The cost of legal services continues to rise, and the middle-income American is caught in the crunch. I would say that the statement by one of your witnesses "Nobody cares. Nobody gives a damn," perhaps overstates the case. The State Bar Associations and local Bar Associations are quite aware of the problems and would be more than ready to assist in manageable or responsible solutions. Our Association would be more than happy to assist you in any way that we can. Thank you very much for the opportunity to submit a statement.

Very truly yours,



WILLIAM L. PECK, Chairman
Lawyers Reference Service Committee
Ventura County Bar Association

WLP/cjg

cc: John F. Fay, President
Ventura County Bar Association

LAW OFFICES
TREZZA, ITHURBURN, KEELEY, STEIDLMAYER & BOWER
A PROFESSIONAL CORPORATION

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FRED B. ITHURBURN
TERENCE J. KEELEY
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P. O. DRAWER 5
506 SECOND STREET
YUBA CITY, CALIFORNIA 95601
TELEPHONE (916) 673-5631

October 29, 1973

John V. Tunney, Chairman
U.S. Senate Committee on the Judiciary
Washington, D. C. 20510

Re: Judiciary Subcommittee on the Representation
of Citizen Interests

Dear Senator Tunney:

In response to your letter of October 3, 1973, I personally feel that the wrongdoer should pay for the attorney fees and costs of the litigation he caused. I think that the present procedure of allowing taxable costs would be a good vehicle for requesting attorney fees and other costs to be taxed on the defendant. By this means the counsel for the defendant can contest unreasonable attorney fees and costs, and we will have a judicial determination without any great involvement of time or expense on our judiciary.

Very truly yours,


FRED B. ITHURBURN

FBI:cn

East Douglas Mass. 8-11-73

Dear Sir:

I read in our local paper that you are starting Hearings on Lawyer fees I have a problem with a Lawyer I think he overcharged us. A few months ago I started having problems with my 17 year old son, he was taking our car without our permission, so we took his drivers-licence away from him and returned it to the Registry of Motorvehicle after that my son took a car that was not registered or insured, but it did belong to my son, he drove it to the next town was stopped there and asked for his licence and registration by the police, he told them he did not have on his person, after I found out about it, I called the Police in Whitinsville and found out that he had attached my husbands Plates all this happened while we where at work. I then told the Police that I was having problems with my son at home, so the Police told me they would bring it to court right away in the hope of maybe getting him on Probation because he was in with a bad group of kids and we had lost all control over him, he had quit school and his part time job and he would come and go as he pleased as a result life was not very pleasant around the house what made things worse my husband has a severe Heart-condition and all that worry I was close to a nervous breakdown and I was looking for help from anyone even a Probation officer, in the meantime my son took the same car again with my husbands plates and this time was caught right downtown by our local police, The local Police Chief here knew our problem with him and also that that car was not registered or insured and that the plates belonged to my husbands car. That same week the Whitinsville brought my son to court with our local Police Chief there to ask for a continuance to the next day so that both cases could be tried together in the meantime my son pleaded guilty but the Judge refused to accept the guilty plea without counsel but did continue the case till the next day, that night I called a Lawyer and asked him to go to court with us so we could get it over with I needed help badly and was hoping if my son would be put on probation he would be made to go back to school or get a job and at least he would not have so much time to get into worse troubles, that Lawyer went into court asked for a continuance which did not help us any because it left things as they where, but we did get to talk to the Probation Officer and he asked us if we could think of any solution and we told him the only thing we could think of would be to get him into the Navy maybe if he was away from that group of friends and get some discipline from some one else things could straighten out, that Probation talked to my son and told him if he would consider going into the Navy he was sure the Judge would be inclined. My son then went to see the Navy Recruiter and decided to join the navy we signed all the papers and when the court hearing came up my son called that Lawyer and told him that he was joining the navy and that he did not want him to go to court with him, the lawyer told him it would cost him \$ 350.00 if he went to court with him or not, the next day the Lawyer did go to court told the Judge that the boy had joined the navy and the Judge ordered the charges dropped if the boy went in to the navy on May 16 my son left for Great Lakes Navy training center and on May 18 the charges where dropped a few days later I talked to that lawyer, he told me the fee would be \$ 350.00 and to make sure to take it out of my sons account, I had made the mistake to tell that Lawyer that I was holding \$500.00 of my sons money that he had saved from his parttime job. that lawyer did not do anything for us and also nothing for my son we did all ourself and I think he is charging too much for two five minute appearances in court.

in the meantime my son completed basic training got himself three stripes by the end of basic and seems to be doing very well, he came home on leave after basic training, he gave us no trouble while he was home stayed away from these old friends and got his license back he then called that lawyer and asked him if he would consider \$150.00 because he wanted to buy a car the lawyer told him he would not take so send place to a car. I have not paid that bill because i think it is outrageous but i expect to be pulled into court at any day over it. By the way we did give my son his money to buy the car because we had told him if he would straighten out out and do good we would help and stand behind him, Enclosed is the bill from the attorney, please could you help it very difficult for us to pay that much money because my husband is not always able to work because of his heartcondition

Sincerely

LAW OFFICES OF
BROWN AND LEIGHTON

HAROLD BROWN
PAUL E. LEIGHTON
HERBERT COHEN
PAUL A. PALERMINO

BOSTON MASSACHUSETTS 02109

August 15, 1973

Senator John V. Tunney
Senate Office Building
Washington, D. C.

Dear Senator Tunney:

I heartily applaud your effort to examine the subject of providing "quality legal services to persons of moderate means." For centuries, the organized bar was wholly ignorant of the problem. Efforts to obtain improvement in the past decade have met with incredible resistance both by the Bar and the Bench, always under the aegis of some supposedly sanctified principle which no longer has any validity.

I'm sure you know of Mr. Christensen's superb book on this subject. I enclose our book review on that work for inclusion in the record of your hearings. Incredibly, the strongest support has come from the Supreme Court and some appellate courts, but with much heel-dragging by lower courts and bar associations. I also offer for your record, my article in the Sept., 1972, issue of the Boston Bar Journal entitled, "A Meaningful Opportunity to be Heard."

As an aside, you may chuckle from the report that in spite of the vigorous support of the Executive Director of the Boston Bar Association, that article had to be held up from publication for almost 10 months on the quaint excuse that no author should have published more than one article a year. The fact that hapless defendants were in the meantime subjected to patently unconstitutional prejudgment attachments, was not regarded as a supervening circumstance!

As for "group legal services," the intransigence of the ABA and its state counterparts, has been woeful. As you know, on this issue, the ABA Code of Professional Responsibility is unconstitutional on its face, yet it has been slavishly adopted by a majority of State Supreme Courts as well as numerous federal agencies, such as the U.S. Patent Office. I am also enclosing for your record a copy of my article,

LAW OFFICES OF
BROWN AND LEIGHTON

Senator John V. Tunney

- 2 -

August 15, 1973

"A.B.A. Code of Professional Responsibility" published in The Catholic Lawyer (1970), since it covers this and other issues relevant to your inquiry. When this article was published in the Boston College Law School "Annual Survey of Massachusetts Law," both the law school and the printer had so much trepidation that they used a footnote expressly disclaiming any support for my views.

Finally, as you may know, I have vigorously attacked all efforts to "integrate" or "unify" the state bar associations since I am thoroughly convinced that the Bar already exercises enough monopoly power and is the only avowedly self-regulated such institution. I am enclosing for your record my article attacking the effort to "unify" the Bar in Massachusetts, including the patently illegal minimum fee schedules.

As you may know, I have strongly supported the effort of franchisees to obtain both judicial and legislative relief, my second book on this subject being ready for publication by the New York Law Journal under the title "Franchising: Realities and Remedies." Incredibly, that program has been bitterly assailed for "fomenting" litigation.

Finally, you will inevitably find that even when small businessmen learn their rights and obtain qualified counsel, the litigational costs can be an effective bar. Where there is such strong public policy as in the need for private enforcement of the Antitrust Laws, Senator Philip A. Hart has publicly recommended that the SBA provide loans for such purposes. On the more conservative side, I have urged that potential "class" members be apprised of such claims, with active solicitation of their financial support. To avoid abuse, such effort would be under the guidance and approval of the Court. In that way, each small client could provide the wherewithal for the meaningful assertion of legal rights, as suggested by Mr. Justice Thurgood Marshall in the recent case of State of Hawaii v. Standard Oil Co. of California. Instead, the Rules for Complex Litigation expressly bar all such solicitation, as though the latter were an evil, per se.

You will quickly discover that all such blockades are in fact designed to defeat the assertion of rights before the issues can be heard on the merits. Anyone who tries to change the system will soon find that those who do not like the message, will turn their wrath upon the messenger.

Sincerely,

HB:md
Enclosures

Harold Brown

Marina, Ca. 93933

The Honorable John V. Tunney
United States Senate
Washington, D. C. 20510

Dear Senator Tunney:

Perhaps, rather than having written the attached letter, my wife and I should each light lanterns and search the streets throughout the State of California during the hours of daylight, day after day, and upon completion begin a state by state search throughout these United States looking for an honest man, as Diogenes did, in ancient Greece, allegedly.

Should the situation, as described, not fall within the purview of your office, we would appreciate you forwarding the correspondence to somebody, who in your opinion, is in a position to take positive, and decisive action concerning the matter.

Sincerely,

408/384-6979

P. S. Dear Senator Tunney, I HOPE this may fall within the purview of the second Senate subcommittee you have been named to chair; the Subcommittee on Representation of Citizens Interests of the Judiciary Committee, Mr. Chairman; they've been pulling this stunt awhile. Every best wish for your continued success. (oops! by they, I mean to say British Leyland Motors Inc, Leonia, N. J.

Marina, Ca. 93933
September 10, 1973

On November 28, 1972 my wife and I bought a new Jaguar XJ6 4 door sedan from British Motors of Monterey with warranty of 1 year or 12,000 miles. Prior to the sale both salesman and general manager advised we considered air conditioning VITAL, due to our physical conditions (Pls See Encl 5), and also we were considering another car made in the USA. We were attempting to equate features involved with both cars. Other dealership had demonstrated American made car and allowed me to drive it, with my wife present, as well as my oldest son and his wife and their 3 year old son. Jaguar thereupon was demonstrated for us, and I was allowed to drive it, as well. Assured by salesman and general manager factory installed air conditioning comparable to American car, as well as standard equipment, together with automatic transmission on ALL XJ6s EXPORTED to the United States. We read the specifications set forth on backside, fourth page, slick-finished pasteboard in full color, consisting of 4 pages (or 8, counting front and reverse each page) of 10 1/2" W x 9 1/2" L brochure, British Leyland Motors, Inc., Leonia, N. J., listing under "Optional Equipment: Factory-installed air conditioning", among ~~other~~ other features. This brochure (I still have it) obviously originated from N.J., and it seemed logical, as well as quite evident, that statements contained in pertained to IMPORTED XJ6s, and therefore verified information given us by salesman and General manager. In addition, having previously read British Leyland's advertising by national news media in news and business magazines, as well as newspapers, in this country stipulating in print, without qualification: "...standard features...air conditioning...". The most recent to come to my attention, for example, is a full page color ad on page 23, June '73 issue of Fortune magazine. Also, specified, without qualification, in the Operating Instruction Booklet for the '72 XJ6, in that section pertaining to air conditioning, on page 32 is a sentence reading: "Movement of the quadrant levers, mounted below the radio aperture in the console, to the (Dashboard) position will direct refrigerated air only to the screen (air vents set on extreme right and left sections of dash). And, also, there is a separate card, 4" W x 7" L, title: "Delanair Air Conditioning System As Fitted to 2.8 Litre and 4.2 Litre Jaguar XJ6." The card is headed beneath the title, as well, with sub-title: "General Information and Operating Instructions", and states, in part, on the front: "...Rotate the switch clockwise towards "COLD" to obtain desired temperature (underscoring mine), and on the back side of the card under: "Operational Hints".... (para. (2)) If the car's interior becomes too cold (underscoring mine) even after switching the fans to "SLOW", turn the switch "B" counter-clockwise until the desired comfort is reached. And, finally, under that portion of the "window sticker" on car's window listed under "options and accessories installed by manufacturer, one of the items listed is Air Conditioning: \$534.00.

Car driven period Dec '72 - May '73 at which time air unit indicative inadequate at temps approx 90 - 95 degrees, since necessary to strip to the waist to obtain any slight relief from the heat, while I was driving; July '73 temp 112, air unit malfunctioned and expired, mileage approx 9,559; sub-let for repair by dealership (NEW OWNER); Aug 31, '73 temp approx 99, blew out BLAST OF HOT AIR, as hot as that obtained at high setting on HEATER control, and expired, once again, ~~in area between Bakersfield and Mojave, California~~ in area between Bakersfield and Mojave, California (a distance approx 53 miles); when it expired was approx 11,665 miles. On Aug 10th, mileage verified by Service Manager, dealership as 11,468, necessary due to replacement part on order (now on backorder) not available @ Los Angeles, and if not stocked N. J., necessitated obtaining from

✓ 11,820 ~~Yag~~ - 1 -

UK, amount of time to acquire part and shipment to dealer so as to have in stock to install my car unknown; and, as of this date, part not received.* Also, as of Sept 6th, my car was driven to dealership for repair of air conditioner and replacement of any and all parts that may be required, inasmuch as dealership previously repaired it w/mileage @ 9,959 when it reached his shop, and performed required 9,000 mile service as well; on that occasion, the car was kept at the shop from the 9th of July, approx 5:00 PM in the evening, July 13th, ^{when my} it was informed it was ready for me to pick-up. The mileage on car when delivered shop Sept 6th approx 12,554 miles.

*necessary to record mileage when draft extruder ordered since, in all probability, my mileage would have exceeded 12,000 miles - out of warranty, upon its arrival.

Todate, I have written 4 letters, attempting to employ various techniques of approach, during period Aug 13th - Sept 5th re: complete uselessness of air conditioner, demanding that it be removed from car and the \$534.00 reimbursed me, or else have a factory rep brought in and have it tested with me present. Aside from the air unit, I stated wanted alleged \$300.00 AM/FM/stereo tape deck out of the car and replaced with unit of different make that would operate, since I was unable to retain AM reception, alone, when driving from the Marina - Monterey area to San Jose, or the San Francisco bay region on US 17; the unit was selected by the general manager of the dealership (old owner), sub-let for installation, and not shown on the bill of sale, invoice, or window-sticker; however, it can be verified that the dealership (old owner) did, in fact, send XJ6s to a particular shop, "Auto Stereo", on Del Monte Blvd, Seaside, California. Neither my wife, nor I saw the unit, or had anything whatsoever to do with selecting it. As a matter of fact, after it was installed, for all practical purpose, insofar as appearance was concerned, it looked to us like a \$300.00 AM/FM/stereo tape deck. Furthermore, I had previously complained verbally re: unit's performance, prior to any formal written correspondence that was initially begun by me; presently installed is, allegedly, either 4th or 5th unit of same make with no change in performance; and frankly, I've lost count of the number of times unit has been reinspected, reconnected, because of loose wire, allegedly, and replaced. (Unit thrown-in w/the deal as incentive, at no charge ^{by} GenMgr) Average yearly temperature for Marina - Monterey area is minimum 47.7 degrees, maximum of 68.8, with average humidity of 75. So, as you can see, I only require air unit upon leaving my area of residence. And should be, in San Francisco rarely required, which it has proven to be, while driving in that city. However, one can drive through the State of California and encounter many and varied climatic conditions: Sacramento, Fresno, Bakersfield, areasthrough the San Joaquin valley, Barstow, and so on, are extremely hot in summer months, as well as Nevada. My initial letter acknowledged by Jaguar Cars for British Leyland UK Ltd (please see Encl 1) on Aug 16th; BL Motors Inc, N. J. on Aug 20th; (Pls See Encl 2), and EMC Distributors, Ltd, San Francisco on Aug 27th (Pls See Encl 3), and again on Sept 4th (Pls See Encl 4). My fourth letter to Mr. A. T. Perry, dated Sept 5th, although I expect to receive no reply. ^{My} All four my letters, info copies to UK, N.J., or San Francisco, regardless of which office original was mailed. On Sept 7th, phoned Mr. Abramson, Customer "Service" Manager, N. J. - he referred me to Mr. A. T. Perry, Vice-President For Service, EMC Distributors, Ltd, San Francisco; upon phoning and identifying myself, I was told he was at a meeting and would probably take a late lunch, by his secretary, who had no record of receiving my letter of Sept 5th; we arranged to have Mr. Perry phone me @ 3:00 PM, thus allow for termination meeting, lunch, and time to attempt to find letter. At 3:00 PM Mr. Jock E. Hockley, Service Engineer phoned, stating Mr. Perry was gone for the day and he was speaking for Mr. Perry. We talked for a half hour, according to Mr. Hockley, and accomplished, for me, absolutely nothing. I stated to Mr. Hockley that my wife

and I had been told at the time of purchase that the air conditioner was comparable to those units in American cars, specifically, a Lincoln Mark IV. He asked whether we had a written statement to that effect. He further stated that operation of the automobile at high speeds resulted in the air conditioner producing less cool air. He stated, once again, that he had chocked w/Mr. Ron Woodridge, Service Mgr, DM of Monterey and had been told that "the air conditioner" was operating to normal standards. I informed Mr. Hockley I was prepared to go to court even if it necessitated me consulting and retaining Melvin Belli, of Belli, Ashe, Ellison, Choulos & Loeff, whose office and firm are located in San Francisco (of course, I had no such intention at this point in time) (having already consulted 5 attorneys in Monterey area). Mr. Hockley stated that I was merely dropping names, which was, as a matter of fact, quite true. I asked Mr. Hockley if we could somehow negotiate the matter outside court, by exchanging my XJ6 for a '72 or '73 XKE demonstrator, or "executive car", inasmuch as the Monterey dealership (new general manager) and finally established that there was, indeed, a great deal of difference in the air units in the 2 cars. (XKE which was in same price range as XJ6, comparably equipped, when I purchased mine, has much less tubing through which cold passes from refrigerating unit to dash vents, consequently much, much, less loss of cold air before it reaches dash vents, which play an important part in the manner in which the cold air is distributed through the car, since they are completely arranged in a different manner, to include size, shape and positioning, plus the fact that the car itself has an interior consisting of LESS cubic feet than the XJ6) (and I had informed general manager in Monterey that, of course, I was prepared to pay a reasonable amount of money in order to get out of the XJ6 and into a car made by Leyland that would have a system very closely comparable to an American unit; that what's fair is fair! (Mr. Hockley told me that there was absolutely nothing he could do; it was up to the dealership in Monterey (new owner); the general manager had already told me on Sept 6th that in order to get into an XKE w/air and automatic, it would cost very nearly \$5,000, unless the distributor was agreeable to absorbing some of the loss accruing to the Monterey dealership. I offered \$3,500, including tax and license, to which the general manager at Monterey was agreeable, provided distributor went along with it; (realizing that he could telephone the distributor, or vice versa ~~with Mr. Hockley~~ his office) I, myself, however, did not get into all this detail with Mr. Hockley. He stated THAT the XKE and XJ6 were two entirely different automobiles, that I owned a used car that also was out of warranty. We mutually agreed further discussion, or attempts on my part, at least, to negotiate with him useless. I told Mr. Hockley I hoped he enjoyed the weekend holiday period. He hung up, but ~~not~~ ^{repeating} that he was speaking for Mr. Perry.

Having been advised that I had no grounds for a legal suit against Leyland, et al, although none of the 5 attorneys consulted mentioned a "class suit", I am, personally, not yet convinced that grounds for class action litigation against British Leyland Motors do not apply; it's inconceivable to me, that I own only XJ6 w/faulty air. BL, UK ranks 23rd among 300 largest foreign industrial companies, sales: \$3,247,877 billion for last year; net profit: \$59,717 million. (See Fortune magazine, September, 1973 issue).

^{BACK}
What my wife and I have to look forward to now, after receiving the car, with the air conditioner repaired again, one more time, is the fall and winter months, until approximately 9 more months, when May '74 arrives and we switch on the air conditioner for a lengthy, sustained period due to the outside temp and it expires, once again, at which time we shall be forced to have it repaired at our expense, each time we operate during the summer, in hot areas. Now, will that be fair to us? Would it be fair to anyone? We bought the car in good faith. We bought the car

only after having read the BLM brochure, and after being assured by who stated he could fully understand the air conditioning pertaining to me, particularly, since he held a pilot's license, but could no longer fly due to suffering a heart attack, himself, some time during the past, and the importance of it in relation to my wife's condition, as did the general manager assure us that he fully understood the problem, and in order to sell us the best car he would "throw-in" with "the deal" an AM/FM/stereo tape deck, at no charge, which, indeed, he did; however, aside from the fact that we've only recently ascertained that it did not sell for \$300.00, it does not perform to the standards of such type units installed by an American car dealer, or by any means to ANY radio we've ever had the misfortune to encounter previously as a malfunctioning, or weak signal unit, which until doing business with BLM we did not ever, in the past, encounter.

Naturally, I have all papers pertinent to the matter: bill of sale, invoice, window sticker, copies of all correspondence sent to BLM UK, N. J., and San Francisco, as well as Operating Instructions booklet furnished with the car and so on, as previously described.

Now, we can live with the radio unit if we have to do so, without it being removed and a unit that WILL perform properly ^{AS INSTALLED} by BLM. It is the AIR CONDITIONER with which we can not live (Again, Pls See Encl 5). And we can not understand how the XJ6, 1972 model, COULD be sold to a prospective customer living in an area where the summers were exceedingly hot, if the salesman, or the general manager, or the owner of the dealership were to advise the customer, just prior to concluding the sale, what the "normal operating standards" are, as set forth by the distributor's Service Engineer (Again, Pls See Encls 3 and 4), and only we two own an XJ6 with such an impotent, malfunctioning unit that continually expires at exterior temps approaching 90 - 95, and produces NO RELIEF inside its interior, unless one strips. Therefore, as citizens of these United States of America, my wife and I are now convinced that we have been most grievously wronged and dealt with unfairly and dishonestly, with possible resultant physical damage to me, from which I may be completely unable to recoup, or compensate for, as well as possibly aggravating the physical condition of my wife (Again, Pls See Encl 5), and appeal to you for aid in obtaining redress, to include prohibiting further import of Jaguar XJ6s with factory installed air conditioning into the United States, and action taken to force BLM UK, N. J., and any and all of its other distributors and dealerships, to cease and desist allowing their salesman, general managers, and owners of dealerships to practice any deceptive sales techniques, as well as make any statements of misrepresentation regarding any optional, or standard equipment involved in the XJ6, and to cease and desist ^{FROM FURTHER} national misleading sales advertising through the means of this country's mass news media, including magazines and newspapers sold either nationally, or locally, but not limited to only those type channels presently utilized and containing deceptive information pertaining to ^{any} one of the products BLM manufactures, but to include advertising by television, radio or any other means available to them within these United States.

Yours very truly,



Jaguar Cars

BRITISH LEYLAND UK LIMITED

Browns Lane, Allesley, Coventry CV5 9DR

Telephone Allesley (0203 34) 2121 Telex 31622 Cables Jaguar Coventry

FRWE/HML.

Marina,
Cal. 93933,
U. S. A.


16th August, 1973.

Dear Sir,

Thank you for your letter dated the 13th August, from which I am concerned to learn you have experienced certain problems with the XJ6 Jaguar car which you purchased in November last, some of which are still outstanding.

Since all matters relating to Jaguar cars sold and operated in the United States are handled by British Leyland Motors Inc. of Leonia, New Jersey, I am referring a copy of your letter to the President of that company, requesting him to ensure that action is taken to deal with those matters to your satisfaction.

Yours faithfully,
For JAGUAR CARS -
BRITISH LEYLAND UK LTD.,


F. R. W. ENGLAND.
MANAGING DIRECTOR.

ENCL #1



BRITISH LEYLAND MOTORS INC.

600 WILLOW TREE ROAD • LEONIA, NEW JERSEY 07605 • Tel (201) 461-7300 • Telex No 135491

August 20, 1973

Marina, California 93933

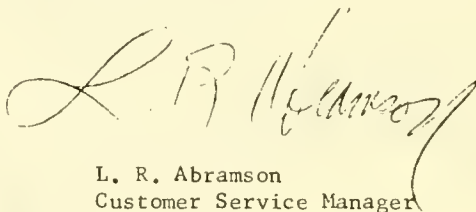
RE: Jaguar XJ6
Serial No. UCIL00068820BW

Our President wishes me to acknowledge your letter of August 13, 1973 and to arrange for the situation which you describe with your Jaguar XJ6 to be fully reviewed by our Distributors and your dealer.

Our Distributors are British Motor Car Distributors Ltd., 1200 Van Ness Avenue, San Francisco, California 94109 and we are today requesting them to make arrangements to be further in touch with you either directly or through the dealer concerned and we are also asking them to let us know if there is any way in which we can assist them in this matter.

Trusting our action meets with your approval and assuring you of our continued interest.

Very truly yours,



L. R. Abramson
Customer Service Manager

LRA:swh

cc: Mr. A. T. Perry

ENCL # 2

AUSTIN

JAGUAR

MG

LAND ROVER

TRIUMPH

BRITISH MOTOR CAR DISTRIBUTORS LTD



BRITISH MOTOR CAR DISTRIBUTORS LTD
 10000 WOODRIDGE DRIVE, MONTEREY, CALIFORNIA 91933

BRITISH MOTOR CAR DISTRIBUTORS LTD
 10000 WOODRIDGE DRIVE, MONTEREY, CALIFORNIA 91933

August 27, 1973

Monterey, California 91933

RE: 1L68S206W

Thank you for your letter of August 13th regarding your Jaguar XJ6,
 a copy of which has been passed to us.

We regret to learn of your unhappiness with the radio and air conditioning unit. The radio and its problems are a matter entirely between yourself and the selling dealer as this unit is not covered by any B.L.M. factory warranty or service. The dealer fits the radio that the customer requests and it is, therefore, covered by the policies of the manufacturer concerned.

I have checked with British Motors of Monterey and they assure me that the air conditioning unit was operating to normal standards for a Jaguar XJ6. As this unit is of smaller size and, therefore, capacity, it is not possible to compare it with any domestic unit. It would not be possible to remove it from the car as it is an integral part of the construction and basic price of the automobile.

X
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 UTIONA

With regard to the differences in purchase price quoted which as you pointed out was not finalized dealer handling and transportation charges and trade-in values which vary from area to area have a marked effect on final car prices.

If you wish to "swap" your car, may we suggest you take this up with your local B.L.M. dealer.

Yours very truly,

BRITISH MOTOR CAR DISTRIBUTORS, LTD.

Jock E. Hotkley
 Service Engineer

JEH:sjt

cc: Mr. Ron Woodridge
 British Leyland Motors, Inc.

BRITISH MOTOR CAR DISTRIBUTORS, LTD.

1200 VAN NESS AVENUE • SAN FRANCISCO • CALIFORNIA 94109 • (415) 776-7700

KJELL H QVALF
PresidentANDREW M REGALIA
Executive Vice President
and General Manager

September 4, 1973

Marina, California 93933

RE: 1L68820BW

We acknowledge receipt of your registered letter of August 29th.

It would appear that it is pointless to continue this correspondence, but for the record I will note our answers to the two main problems you have with the car.

1. The radio was supplied and fitted by the selling dealer and, therefore, it is solely his responsibility to satisfy your requirements.
2. The air conditioning unit I am assured by British Motors of Monterey is operating to normal factory standards for a Jaguar XJ6.

Yours very truly,

BRITISH MOTOR CAR DISTRIBUTORS, LTD.

Jock E. Hockley
Service Engineer

JEH:sjt

cc: Mr. Ron Woodridge
British Leyland Motors, Inc.

Indio, California

17 September 1973

Senator John V. Tunney
Washington, D. C.

Dear Sir:

I read in the paper today that hearings were being held regarding lawyer fees.

The plain truth is that the majority of us do not have access to justice simply because we cannot afford it.

In 1973, I've had the experience of being sued AFTER I had voluntarily written to a man's attorney asking how much I owed the man, as there was a bill coming up the following month and I didn't know how much it was. Of course, this suit said I had refused to pay. The letter was ignored.

Of that isn't false, I never saw anything that was, but the notices that go out throughout the business world or the record does not reflect this.

In 1973, I paid for a dessert cooler which was never sold to me, which I never saw, which I never heard of until threatened with a suit, and finally sued.

I wrote to the man's attorney and tried to learn when and where I was furnished this cooler, and hired an attorney myself, and asked him repeatedly for months to find out where this non-existent cooler went.

My attorney never did find out for me except the time was 1972. Eventually, on his advice, I paid because, quote "you never can tell what kind of mood the Judge will be in," unquote.

This is justice?

This week I was charged for a radio which was stolen. I never stole that radio or any other one. I have never even seen it.

Page two

I never heard one single utterance that could remotely connect me with the theft of this radio. I am aware of a report to the police with a different value for the radio, a different date for the theft by 4 days, that it took place from 4 to 6 pm on Sat. June 16, when I wasn't within 30 miles of the place.

I'll let someone furnish the adjectives, for the ones I have to describe this kind of so-called legal system are not the kind I can write here.

In a real estate deal in 1973 where we were selling our home, the final week of the escrow we were presented with costs we would have balked at had they been presented at the beginning of the deal.

We wind up paying $\frac{1}{2}$ month's payment LONGER than we owned the house, interest for 3 days AFTER we have the house recorded to the next owners, and over \$500 loan penalties on a loan that was never in our name and never could be, and we can't even get a copy of the loan, plus we learned we had been paying \$2 a month more than was being credited to the loan.

Beautiful case? It cost us \$100 to an attorney to learn it was cheaper for us to pay than to stand the suit if we didn't deliver the house, and take a chance on recovering.

Legal justice? What in the world is that? It isn't available around here at prices anyone can afford.

Sincerely

San Diego, California

SENATOR JOHN V. TUNNEY
 3425 New Senate Office Building
 Washington, D.C. 20510

18 September 1973

Re: Lawyers Fees

Dear Senator Tunney:

September 16,

I noted in the Sunday 1973 edition of The San Diego Union that you are beginning an investigation of lawyer's fees and consumer access to lawyers. Congratulations, I feel that it is high time that such an investigation be made including, I hope, an investigation into the method of establishing maximum fee schedules. The maximum fee schedule for probate in the state of California can result in excessive fees for the amount of work involved. A personal example is presented in the following paragraph.

Estate of Jeanette C. Potthoff, deceased, distributed to Jack Russell Potthoff, son and sole distributee, without rendering accounting.-- Total value of estate \$70,537.22.--Maximum statutory attorney's fees as ordered by the court \$2040.75.

Assuming a fee of \$50.00 an hour, the above fee represents forty (40) hours of work required in the case cited. In this case I doubt that half that amount of work was required. In my mind, fees based on the value of the estate are unjust in that they do not reflect the amount of work required on the part of the attorney which is really what his fee should be based on. This type of schedule should be abandoned in favor of a schedule based on realistic estimates of the hours of work required to do a job, an hourly rate, and cost of living adjustments as is done in private industry. In the San Diego area at least, it appears as though the lawyers charge and the judges go along with charging the maximum allowable statutory fees almost by design and the client must pay or go without legal services.

In summary, I hope to see the present method of establishing maximum statutory attorney's fees abandoned in favor of a schedule-based on the actual work involved, i.e., estimated hours, hourly rate, and cost of living adjustment.

Sincerely,

P. S.- I also feel that governments should pay part of the appraisers fee as a ratio of taxes to the total value of the estate.

Houston, Texas 77021

September 18, 1973

Senator John V. Tunney, Chairman
 Judiciary Subcommittee on Representation of Citizen Interests
 Senate Office Building
 Washington, D.C.

Dear Senator Tunney:

The thing that hurts more than the very high prices, is the attorneys' putting off a trial for years to weaken the other side.

Case No. _____

Mrs. M.

vs

X Company, Y Company, Z Insurance

Case filed October, 1969, not yet tried!

Company applied to 17 rent houses roofs of X Co.'s shingles guaranteed for 15 years and bonded by Z Insurance Company. These roofs suddenly went to pieces (they used an experimental granule - aplite - that failed). Our attorney filed suit for us in October, 1969. Their attorneys have put off the case for one reason or another ever since. The last time was in June of this year when X's attorney put it off by filing his proposed vacation time during that period and did not inform us or our attorney although we were all with him five days prior to the trial date when taking a second deposition.

What can a layman do when he has already paid an attorney a retainer and we are still not in court? Is this more Watergate?

Sincerely,

SEP 25 1973

Del Mar, California
92014

September 23, 1973

Senator John Tunney
Federal District Court
325 West F Street
San Diego, CA

Dear Senator Tunney:

I am one of many Americans who are wonderfully encouraged by your present effort to investigate the conduct of those in the legal profession.

I will soon appear as a defendant in Small Claims Court, Beverly Hills Judicial District, County of Los Angeles, in a suit for \$400.00. I am being sued by an attorney, employed by the Public Defenders Office of the County of Los Angeles, to whom I sold a house. The suit was originally for \$15,000.00. I consulted five (5) different attorneys for representation. Their advice was the same. "He is suing you for \$15,000.00 to force you into Superior Court. It will cost you up to \$1,500.00 to fight the suit. Save money, pay him the \$400.00 he is willing to settle for."

I could not get an attorney to represent me for less than twice what I could settle for. This, I believe, is something on which my opponent counted. I am an American of modest, but comfortable means. My conscience will not let me settle for \$400.00; because, I feel it is extortion of \$400.00, by of all people, an attorney.

The original "bone of contention" is embarrassing. A bed, a refrigerator and a stove in a real estate sale. I believe you might find the case of interest in your quest for "ethics in the legal profession." For the reasons mentioned above, I will not be represented by counsel.

Very, best wishes,

Committee on Military Justice

(Formerly Committee for Legal Research on the Draft)

Room W-139A, Langdell Hall, Harvard Law School, Cambridge, Mass. 02138 • (617) 495-4820

September 24, 1973

Senator John V. Tunney, Chairman
Subcommittee on the Representation of
Citizen Interests
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Tunney:

The Committee on Military Justice is a non-profit tax-exempt organization composed basically of law students from Boston area law schools. Our work consists of several main facets: military law reform, acting as research assistants to defense counsel in military cases, developing memoranda on specific points of law, counseling of servicemen, and serving as a repository and source of military regulations and related materials.

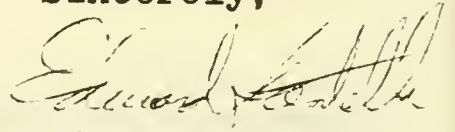
CMJ has a deep interest in the hearings your subcommittee currently are conducting concerning the ability of tax-exempt law firms to accept court-awarded legal fees. Although we are essentially a legal research organization, we recently have been involved in law suits which normally are fee-generating. For example, in United States v. Rainville, Criminal No 72-433-F (D.C. Mass. 1973), members of CMJ recently served as court-appointed counsel and won an acquittal for a man charged with violations of the Selective Service Act. Although we presently are applying to the federal government for legal fees and expenses, our ability to accept such funds is entirely dependent on whether we would be risking our tax-exempt status (and thereby our ability to survive as an organization dedicated to justice in the military).

Like public interest law firms, we are funded entirely through private contributions. Like those firms, we provide unique services which would cease to be available should we lose our funding or our tax-exempt status. The ability to accept court-awarded fees without endangering our tax-exempt status would enable us to continue and expand our services to the public based on a far less tenuous financial situation.

The Committee on Military Justice encourages you to consider favorably such legislation as would enable tax-exempt legal organizations to accept court-awarded attorneys' fees. We would appreciate it if you would enter this letter in the record of the hearings and send us a copy of your report when it is completed.

Thank you for your interest in our activities.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Edward Santella', written in a cursive style.

Edward Santella
for the Committee

MONROE COUNTY LEGAL ASSISTANCE CORP.

DAVID C. LEVEN, Acting Executive Director

GREATER UP-STATE LAW PROJECT

130 TROUP STREET
ROCHESTER, NEW YORK 14608

ATTORNEYS:

ARTHUR L. STERN III
Project DirectorSTEVEN L. BROWN
Senior Staff AttorneyDAAN BRAVERMAN
K. WADE EATON
STEPHAN LANDSMAN
RENÉ H. REIXACH, JR.
WILLIAM A. SHAPIRO

FIELD WORKERS:

BARBARA NOTESTEIN
IVAN G. SMITH

September 26, 1973

Hon. John V. Tunney
United States Senate
Washington, D.C. 20510

Dear Senator Tunney:

In the review of citizens' access to legal services, by the Subcommittee on Representation of Citizen Interests, I trust you will be considering the problems faced by the millions of persons living in areas where there is no Legal Services Program or Legal Aid Society.

In the course of this Project's work with Legal Services Programs throughout New York State, it has been brought to our attention that in over one-half of the counties in this state, where nearly two million people live, there are no organized legal assistance programs. For your information, I am enclosing a listing of the 33 counties in which, to our knowledge, there is no organized legal assistance for those who cannot afford private counsel.

While there have recently been promising judicial steps towards a recognition of a constitutional right to counsel for indigent tenants in landlord-tenant proceedings (Hotel Martha Washington Management v. Swinick, 66 Misc. 2d 833, 322 N.Y.S. 2d 139 [1971]) and for indigent defendants in divorce actions (Vanderpool v. Vanderpool, 74 Misc. 2d 122, 344 N.Y.S. 2d 572 [1973]) there are obviously large gaps in the mechanisms for providing legal services in such cases in vast areas of this state.

Equally unimplemented are statutes such as section 131-c of the New York Social Services Law, which provides that Social Services officials shall, upon request, make provision for payment for legal services in connection with welfare fair hearings, but only "if required by federal law or regulations". Since there are presently no such federal laws or regulations, there are no payments for legal services for fair hearings, and persons living in the 33 counties of the state without organized legal assistance programs, plus no doubt residents in at least some of the other counties where

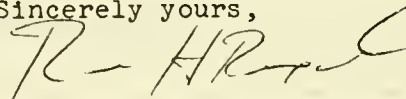
-2-

the existing program does not handle welfare cases, must simply do without counsel. The seriousness of this lack of counsel can be seen by the recent reports that in Delaware and Essex Counties, where there are no organized legal assistance programs or programs providing counsel for fair hearings, 40.0 percent and 37.2 percent respectively of those counties' welfare recipients scheduled for recertification were dropped from the rolls (N.Y. Times, Sept. 21 1972).

We also call the Subcommittee's attention to the fact that private counsel assigned by the courts of this state in criminal actions or in Family Court proceedings are presently paid fees of \$10.00 per hour for non-court time and \$15.00 per hour for court time, with maximum fees of a few hundred dollars for most matters (N.Y. County Law, section 722-b). No doubt the Subcommittee will wish to consider the impact of this fee schedule on the availability of legal assistance, particularly in view of the fees under the Criminal Justice Act of 1964, 18 U.S.C. section 3006A which are twice these provided for in the state courts.

I would be most interested in receiving any reports prepared by the Subcommittee and in being advised of any field hearings scheduled to be held in New York. Should there be any additional information which we can provide the Subcommittee, we would be pleased to do so

Sincerely yours,



Rene H. Reixach

RHR:kah

Enclosure

COUNTIES IN NEW YORK WITHOUT
LEGAL SERVICES PROGRAMS OR LEGAL
AID SOCIETIES IN THE COUNTY

Allegany	Montgomery
Cattaraugus	Ontario
Cayuga	Oswego
Chenango	Otsego
Clinton	Putnam
Columbia	St. Lawrence
Cortland	Saratoga
Delaware	Schoarie
Essex	Schuyler
Franklin	Seneca
Fulton	Tioga
Greene	Ulster
Hamilton	Washington
Herkimer	Wayne
Lewis	Wyoming
Livingston	Yates
Madison	

- Sources:
- 1) Listing of Legal Services Programs served by Greater Up-State Law Project
 - 2) Martindale-Hubbell Law Directory, Volume 5, pp. 248A-250A (1973)
 - 3) 2 Poverty Law Reporter, pp. 11, 427-11,430

Arlington, Virginia

26 September 1973

Dear Senator Tunney:

I am interested in your Subcommittee on Representation of Citizen Interests and am sending you the attached letter and copies of letters regarding my case.

Not one single official in my State is concerned about such a case as mine. It probably happens to large numbers of persons. It shows that our legal system does not protect the people but does protect the legal profession. It shows a very serious flaw in the legal profession. I am due a redress for my grievance and I have been well within the time limitation but I do not have access to a court as I do not have money. How can a citizen get rights if the officials in power of a State do not believe in citizens having rights. The State does not enforce its laws. It enforces laws against a citizen but not that part of the laws which would benefit a citizen.

We have been told to work within the system. My case shows that it is impossible to work within our system because I do not have enough money. Is that a reason for a citizen to be denied equal protection of the laws in a country such as ours which is supposed to be a Democracy. My State refuses to do anything about my case and I have tried every single channel in the State. I wish to testify and bring this to the attention of other powers.

Sincerely,

Legal Fees Study

A Senate subcommittee is beginning a study of the legal profession, starting with minimum fee schedules and consumer access to lawyers.

Plans for a first set of hearings were announced by Sen. John V. Tunney (D-Calif.), chairman of a new Judiciary subcommittee on representation of citizen interests.

"Too often lawyers are unavailable to help citizens at rates they can afford," he said in a statement.

Tunney said the subcommittee would try to determine the extent to which citizens "are not afforded adequate and quality legal representation, and to help to develop remedies."

Tunney, a lawyer as are all the subcommittee members, said "a reordering of financial incentives may help to enable and encourage lawyers to serve more people."

Los Angeles, California

September 29, 1973

Senator John Tunney
United States Senate
Washington, D. C.

Dear Senator:

I must confess as a conservative Republican, I did not vote for you last time, but I am rapidly changing my views. I think you are doing a wonderful job, in your recent proposals controlling attorneys, and I would like to highly commend you on this action. You are about the only one that has ever dared to raise his voice against the all powerful legal profession.

Since you are not an attorney, I am sure you have a much more unbiased attitude than the 60 or 70% of the lawmakers who are attorneys. With them controlling the legislative bodies and controlling the courts, and with a president who is a former attorney, the general public does not seem to have much chance. We have created a privileged class as DeTocqueville said we would. They are an elite that run the country and set their own rules and do really as they wish. Watergate has shown that there are many of them who are not exactly above reproach.

There are several suggestions I would like to make to you, since I have thought about this problem many times. In the first place, as to the matter of setting fees, the attorney is at a complete advantage. He takes a case without telling the client exactly what the charges will be. He then sends an outlandish bill, and claims that is the amount of time he has spent on the case. No other profession or service can get away with this, and it seems manifestly unfair. He is at a special advantage because he can go to court to collect his fee where-as a layman will have to spend more than that in legal fees to defend himself.

~~ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED~~

Page Two
Senator John Tunney
September 29, 1973

Would it be possible to require an attorney to have a contract in writing before he was employed on any case, and that the contract would set down very specifically what the charges would be, - wimilar to the truth and lending act. I should provide that no contract with an attorney would be valid unless this had been presented and signed by the client. It would also seem that the attorney should make an estimate of what he expected the total charges to be on each case which would be more or less a guide to the client.

The second thing is that as far as I am concerned, no judge should be allowed to set a lawyer's fee. It would seem much more fair to have a jury of layman or CPAs or some non-interested party to decide the fairness of a fee when a matter is in dispute. I am sure you realize that when someone does not agree with what a attorney requests as a fee he will go to court and ask that the judge allow him so much either in an estate or in a divorce matter or whatever. I have seen hundreds of cases where the actual client is prevented from even speaking in court, and the opposing lawyer is certainly not going to oppose one of his buddies he will see in the next Bar Association meeting, especially he is not going to oppose him over a matter of fees. This means that a fee is set by an attorney (the judge) for attorneys with no one opposing. There must be some way to control this.

The third matter is the Bar Association, at least as far as it concerns California, is an absolute joke. Having been the owner of a stock-brokerage company for 20 years, I can assure you that the SEC and the Voluntary Association of Security Dealers (NASD) is most vigorous in going after any broker who they think gets out of line. In fact, one broker seems most anxious to get rid of another one.

As for attorneys, the Bar Association, as it is now constituted, is a complete white wash organization, and nothing more. I can give one illustration. The case of ~~of~~ Long Beach who was accused by myself and about 30 other clients over three years ago. There was absolute proof, with no ifs and ands that the man had stolen or taken money from almost every client he had ever had. The man is completely dishonest, and yet the Bar Association is still considering the matter, after three years, and has not even let most of the people appear

against Mr. Allen.

~~xxxxx~~
~~xxxxx~~
~~xxxxx~~

Page Three
 Senator Tunney
 September 29, 1973

In my case I was so incedded, I went to court and the court awarded me \$5,300 which was really only a small part of what I should have gotten back. It then felt so sorry for this poor attorney who said he was out of work, that they allowed him to pay it off at \$300 per month. , not only never paid one payment, but is now hiding out and refuses to even take service as for a debtor examination. The Bar Association says they are so sorry, but there is nothing they can do about an attorney who is in a dispute with a client, and suggest I hire an attorney to follow through.

In another case, an attorney representing me, Mr. was paid \$5,000 against the contingency in a very large case. He suddenly announced he was dropping the case, and that the \$5,000 was already used up. Actually, what he has done, is of so little value to another attorney that I will have to pay the other attorney almost the full amount over again. Now this man refuses to arbitrate the matter before the Los Angeles County Bar Association, and they say there is no way they can make him arbitrate. He had told me he would arbitrate but he now is insisting that I get another attorney and absolutely refuses to put the matter before even a panel of attorneys.

Personnaly, I think legal fees at \$75 an hour are rather ridiculous, and out of reach of any individual. There certainly should be some method of either outlining a normal fee for a case, such as a divorce, and make any additional fee as only valid when there was a signed agreement in advance for a greater amount, or where there was absolute proof that the work was much more than what was called for. There must be some way to set up equitable means of charging fees.

Perhaps another suggestion would be that in any dispute or where the attorney ran over the estimate, the additional fees would be billed at \$25 per hour. This would slow them down on their normal method of getting in a matter and suddenly hiking the fee to the sky.

~~XXXXXXXXXXXX~~
~~XXXXXXXXXXXX~~

Page 4
 Senator Tunney
 September 29, 1973

At any rate you are doing a wonderful job, and I hope you can come with a valid method of controlling the present completely onesided situation that exists between attorneys and laymen. Surveys are shown that the public is about 70% convinced that attorneys are not trustworthy and I am sure you would have tremendous backing from your supporters if you did lead a drive against them. As one further illustration, I would like to give the following: I was sued for divorce a few years ago, and my wife and I were completely harassed by her attorney, Mr.

in Los Angeles. She finally got so fed up with him that she came to me and said she wanted to settle the matter directly. She sent him a letter that she was dismissing him as the attorney, and we went to a man that neither of us knew but was a son of a former friend of ours that we both trusted.

He drew up the property settlement at a total charge of \$100. This property settlement was the entire agreement which was lived up to by both of us. Mr. then convinced her that he should repeat the settlement since he was the attorney of record, and got us to come to his office for another signing, and the necessary final papers. I went out of the country thinking it was all taken care of, and came back some months later finding that Mr. had gone to court, and demanded extra legal fees, and ended up getting more than \$20,000 from me for the divorce. He then had the nerve to bill my x-wife for the additional work he had done for her. She tried to report him to the Bar Association, but of course you know the answer.

This is typical. The man that did the actual work got \$100, and the crook on the other side managed to get \$20,000 for his services which had resulted in no benefit to her whatsoever.

Something must be done about the legal profession, and I hope you can at least start for the first time in American history some control over them, and with some independent agency governing them rather than a Bar Association which is a complete joke.

Yours truly,

Law Offices, Malden, West Virginia

October 2, 1973

Senator John V. Tunney
Chairman of a
Senate Judiciary Subcommittee
Senate Building
Washington, D. C.

Dear Senator Tunney:

Please find enclosed herewith a photocopy of an article taken from the October 1, 1973 Charleston Daily Mail. Said article is being directed to your attention for either informative purposes or humor.

~~This office represents in excess of 100 claimants seeking black lung benefits under the federal legislation providing therefore. I take issue with the newspaper article that says: "...Senator John V. Tunney, D-Calif., said these attorneys earn an average of \$5,000 per claim,...." Said remark was purportedly made by you following the initial paragraph of the enclosed article which says: "The chairman of a Senate Judiciary subcommittee has questioned the size of fees paid to attorneys representing miners afflicted with black lung disease."~~

Apparently, the reporter, John Chadwick, is obviously attempting to make you look like an idiot. This office, as aforesaid, represents in excess of 100 claimants for black lung benefits and has made on the average of less than Three Hundred Dollars (\$300.00) per claim.

~~As an afterthought let me attempt to change the tone of this letter. Each time I re-read this article I find comments such as "Tunney said few people are aware of federal subsidies to attorneys who secure claims for miners under the Black Lung Benefits Act or of federal limits on fees to attorneys who recover benefits for veterans."~~

Senator Tunney
Page Two
October 2, 1973

I defy you to show me, the undersigned, one damn penny the federal government has paid as subsidies to this office, or for that matter, any office of any attorney who represent disabled miners and recovers benefits under the aforementioned legislation.

I ask you as a Senator of the United States of America to know the facts before you run-off at the mouth like a sick goose. If the federal government were paying attorneys to represent disabled miners who have been deprived of benefits under the aforementioned legislation, the problem, of which you are obviously ill-advised, would not be as distasteful and apparently as far out of hand as it has become in rare instances.

Permit me to explain to you how it works.

1. The claimant files an application for benefits.

2. The claimant is awarded benefits and therefore does not need a representative or, the alternative, his claim is denied and he seeks the assistance of a representative, who may be an attorney.

3. The claimant and the representative arrive at a contractual relationship (25% of past due benefits subject to government approval-a standard in this office). And, I am advised the contingency type contract is used in 99.9% of the cases.

4. The case is processed to a finality,

(a) claim is denied and neither claimant nor representative receive one red cent. (Where there is no recovery how can there be a fee when said fee is predicated on an award being granted claimant?)

(b) claim is granted. Claimant receives benefits pursuant to the award with this exception: occasionally the federal government will withhold from the miner's benefits a sum of money which is seldom equal to as much as 25% and, more likely than not, a sum of money equal to about 10% of past due benefits, paid to the claimant, will be withheld pending a fee approval.

Senator Tunney
Page Three
October 2, 1973

The foregoing is done in only those cases where the representative was an attorney.

5. Attorney files a petition for fee approval with the United States government.

6. A federally appointed flunky, sitting in his ivory tower, then endeavors to seek information from a crystal ball that would justify a determination to be made by him telling the attorney what his time and services are "worth". Please tell me Senator how anyone can tell another man what his time and services are worth? We are a government of free men and as such are entrusted with a few inalienable rights one of which permits me, the individual, and not one of my servants (although you may not agree Senator the federal government is my servant) to make the determination what my time and services are worth. It's called FREE ENTERPRISE Senator, something some of you appear to be destroying.

Permit me to expound on a few of my "trouble spots". I would offer for your consideration the following:

(a) Could a Watergate actually have occurred if the public officials in whom the trust of this country has been placed had they considered themselves as "servants" instead of arrogant, egotistical, "the law be damned", individuals determined to do it their way?

(b) The tragic circumstances that occurred in Little Washington, Pennsylvania in December of 1969 clearly reflect what can happen when the "governing bodies" forget their oaths of office, which bind them to a public's service and do not ordain them as an Almighty. And,

(c) What do you think the Founding Fathers of Our Country would have done had they conceived in their mind's eye someday someone in Washington would undertake to tell the taxpaying public they could not, without bureaucratic interference, enter into arm-length, binding transactions. What the Founding Fathers may have done, of course, is pure speculation. However, I know what they have done since this chain of despicable events began - turned over in their graves.

Senator Tunney
 Page Four
 October 2, 1973

7. A fee is determined in some amount. In this office, the fees have ranged from a high of Seven Hundred Fifty Dollars (\$750.00) to a minimum of One Hundred Dollars (\$100.00).

The claimant, the other member of the contingent contract, is then given the opportunity to voice his objection(s) to the amount so determined to be paid to his attorney. (Bear in mind, please, by now the claimant has received and spent his money and seeing the opportunity to wallow in a windfall seizes the opportunity to exercise his "God-given right" (the federal government having now taken on the air of the Almighty) begins to complain about his not having been treated right and he was coerced into entering into the contract with the attorney.)

8. If the public employee to whom the responsibility of withholding benefits, subject to a fee approval, has done his job (feel free to call upon me to show you many instances where the same has not been done and in each instance a federal employee (formerly public servant) advises us the negligence was the result of an oversight) the amount allocated as a fee is forwarded to the attorney and "the balance of his fee" is directed to the claimant.

Senator Tunney what you are doing may or may not be right. Moreover, what you are doing or purport to be doing may or may not be in the interest of the public and, for that matter, the best interests of the former coal miners. What you are purposing to do is, in our humble judgment, illegal, unconstitutional and a downright farce on our system of government.

There is no argument from the undersigned that governments controlled by Dictators, Kings and other forms of government which are derived from anything other than the "will of the people" can do pretty much what they well please and with immunity.

At one point in time I too slopped at the public trough while endeavoring to support my family and start a private practice of law. While so employed I was called upon to file the idiotic fee petitions, a copy of which is enclosed for your benefit, and because it flies in the face of good con-

Senator Tunney
Page Five
October 2, 1973

science and constitutional law, the judicial activism as evidenced in Randolph v. United States, 88 S.C. 695, 1-15-68 notwithstanding, we refused to file said petition in any of the many cases we were handling for social security disability claimants who, through our assistance, ultimately became recipients of benefits. However, for reasons which were purely economical in motivation, we began to file said petition when we left the payroll of our government.

I herewith hand you a copy of the letter we wrote on January 29, 1969 because the same, we feel, sets forth our attitude concerning the subject matter of your committee investigation.

May I offer for your further consideration: You have no business telling individuals how they can and can not contract with one another without first altering our Constitution. You may, however, provide for legal services to indigent, disabled, former coal miners (or for anyone else for that matter) but to do so without violating the due process clause of our Constitution you must provide adequate compensation. Said compensation must flow from the federal treasury and must be available in all cases, win or lose. When you have done this Senator, then you are in a position to complain if one attorney is getting more than another attorney. Suggest this to the four attorneys in Kentucky and see what they tell you.

Speaking of the four attorneys in Kentucky, I, on behalf of all attorneys, urge you to ascertain whether or not they are violating the law by overcharging their black lung clients. If this proves to be the case, they should be brought to trial, convicted and punished accordingly. On the other hand, if their efforts are within the framework of the law, the fact they are making sizeable sums of money as a result of their efforts, training and background, should be little or no concern of yours or anyone else. If they are violating a law and are being unjustly enriched, then we say punish them. Again, on the other hand, however, if a man, lawyer or otherwise, can, within the framework of the law, make more dollars as a result of his time and effort than another man can make doing the same work within the same law, more power to him.

Senator Tunney
Page Six
October 2, 1973

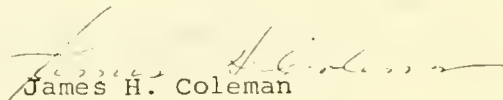
I reflect and become ill when I read where everybody is "equal" and, therefore, are entitled to everything equally. Hogwash! A man should be paid for his efforts not his age, background, (father's background), looks, color, race, creed, religion, sex or any other reason.

The article heretofore alluded to and enclosed herewith makes no bone about what you intend to do as the Chairman of the committee investigating this particular aspect of the aforementioned legislation. Four lawyers from the State of Kentucky found a way to make ten, twenty, thirty, fifty or hundred times more than the rest of us lawyers doing the same work within the framework of the same law and you lose sight of all reason. Senator Tunney our better legislators, I have observed, have a natural facility for maintaining composure, reasoning power and good common sense.

Whatever reason you feel it necessary to champion your cause be it money, prestige, political influence or otherwise I say do so. However, I caution you in so doing please refrain from permitting articles, purporting to quote you, to be released that would give the majority a "bad name" because of a few culprits, if in fact they are culprits. Obviously, you will not be in a position to make that determination until all of the facts are in.

Now lets show that attorney in Malden, West Virginia what happens to the tax paying public when they "mouth off". Lets audit his tax records.

Very truly yours,


James H. Coleman

JHC/rj

P.S. You may not believe this Senator but just this second my telephone rang and Mr. Howard from the District Social Security Administration, Charleston, West Virginia, called concerning a query they had received from Baltimore, Maryland with reference to one of the damn fee petitions. Contact Mr. Howard, if you are a mind to, for further comment with reference to the same.

JHC/rj

LAW OFFICES

JAMES H. COLEMAN

SUITE 704, ATLAS BUILDING

1031 QUARRIER STREET

CHARLESTON, W. VA. 25301

TELEPHONE 342-1014

January 29, 1969

Chairman
 Bureau of Hearings and Appeals
 Social Security Administration
 Department of Health, Education and Welfare
 Post Office Box 2518
 Washington, D. C. 20013

Gentlemen:

For some time now I have had the opportunity and privilege to represent the poor, indigent, and the cripple from the West Virginia logging and coal mining industries in their heretofore futile efforts to obtain disability benefits under the applicable provisions of our "law." Each endeavor was conducted under the terms of a "contract" entered into between the Social Security claimant and the undersigned, as well as within the framework and restrictions of the law.

In the foregoing paragraph, we find two (2) words contained within quotation marks. Before we reach the purpose of this correspondence, let us review the essence of each word in order to assist you in comprehending my actions.

What is a contract? 17 Am. Jur. 2d, Contracts, at page 331, section 1, we find, "A 'Contract' has been defined in brief as a promise or set of promises for the breach of which the law gives a remedy or the performance of which the law recognizes as a duty."

Section 15 says, in part, " . . . Everyone has a right to select and determine with whom he will contract, and cannot have (another) person thrust on him without his consent. The rule

January 29, 1969

Page No. 2

that there must be a meeting of the minds to form a contract involves a common understanding of the identities of the parties. . . .

Needless to say, there are other elements necessary to perfect a contract, as well as other areas to which we must adhere, such as: statutory authorities and limitations. Be that as it may, let us look at the law in question.

Section 206(a), of the Social Security Act (Our Law), provides, in part:

" . . . The Secretary may, (this next phrase is of the utmost importance) . . . prescribe the maximum fee which may be charged for services performed in connection with any claim before the secretary. . . ." (Parenthesis mine.)

Therefore, as this section of the statute has been interpreted by the "superior" beings in Washington, it means: No fee to an attorney unless we are entitled to scrutinize the contract between said attorney and the claimant. If that is not enough, how does this grab you?

"Social Security Regulations No. 4, require a person who desires to receive any fee for services performed in a Social Security proceeding to file a petition containing certain detailed information. For your convenience, we are enclosing three copies of the fee petition form designed to aid you in providing this information. Upon completing the forms, return the original to this office. Send one copy to . . . (claimant) and retain one for your records. . . . (claimant) will have 10 days to submit comments he may want considered in this matter. . . ." (Emphasis mine.)

January 29, 1969

Page No. 3

(The foregoing was taken from a piece of recent correspondence from the "Rubber Stamp" division of the Health, Education and Welfare Department located at Post Office Box 2518, Washington, D. C. 20013.) Absurd!

Speaking of the Appeals Council, of the several matters we have handled involving the Social Security network of conservatives, the "most conservative of all" group, of the aforementioned, have seen fit only once to reverse the decision of a Hearing Examiner. And, would you believe, the said Examiner had ruled in favor of the claimant. Pitiful! This notwithstanding, the District Court for the Southern District of West Virginia, summarily reversed the aforesaid decision. (Webb v. Gardner, Civil Action No. 2369.)

Is the law wrong? Are the rules and regulations wrong? Something is clearly wrong. The claimants for disability benefits need legal assistance (as already pointed out, the conservatism, which appears to be in the majority throughout the Department, is not only staggering, but final, unless properly pursued and corrected.) This is evidenced most amply in Sayers v. Gardner, 380 F. 2d 940. It was stated there with the Court speaking through Judge McAllister:

" . . . Courts should scrutinize the decisions of agencies, more than they have in the past, to ascertain whether they are reasonable and fair. The great number of errors and reversals, in the past, in these cases, constitute a warning signal. . . ."

" . . . Judge Feinberg emphasized how searching must be the review by the courts of the action of the Secretary, and mentioned that in the cases reported in Volumes 227-236 of Federal S Supplement, the Secretary's decision was up-

January 29, 1969

Page No. 4

held only 27 times, but reversed or remanded 47 times. . . ."

Moreover, in Seldomridge v. Celebreeze, 238 F. Supp. 610, the Court said:

". . . A compilation of . . . F. Supp. (Vols. 231 - 234), indicates that of the 28 cases reported, the Social Security Administration was reversed in at least seventy-five percent of the cases. . . ." (Emphasis mine.)

In a recent case in which this office was retained to represent the claimant, the Government withheld from the claimant's past due benefits the statutory maximum permitted as an attorney fee, subject to approval. The sum was \$771.82. As per usual, we had a contract with the claimant for a sum not to exceed twenty-five percent of the past due benefits, nothing from future benefits. In compiling the information necessary to complete the form entitled "Petition To Obtain Approval Of A Fee for Representing A Social Security Claimant," we calculated, using minimum fees per item, as set forth in the Kanawha County Bar "Fees" Schedule, our services to equal Five Hundred Eighty Dollars (\$580). What fee was approved? Five Hundred Dollars (\$500) - - our contract be damned. Disgraceful!

Let us assume, for example, our services had not been "worth" the terms agreed upon in the contract of employment, or for that matter the \$580 we calculated. What magic formula is used by the "Government Man" to ascertain the "worth" of our services? What gives him that "little insight" to perfect his judgment? What does he know about the contingent fee matters handled in this office? Does he really know about the many hours of work which go without reimbursement? How can he know all of these things, when it appears to me he doesn't really know his own job? (See the above citations.) Therefore, it could be said, to further encumber the assigned duties of this man would be unfair to not only him, but those who feel the results of his inadequacies by being deprived.

January 29, 1969

Page No. 5

We represented a claimant for disability benefits beginning at the Appeals Council level. They, as usual, affirmed the Hearing Examiner's denial of benefits. The District Court remanded for the purpose of compelling the Secretary to complete the record upon which a fair and just decision could be rendered. The Secretary summoned us from Charleston, West Virginia, to Morgantown, West Virginia, a distance in excess of 200 miles, at our expense. In attendance at the hearing were the following: The United States Government paid Examiner, his assistant (she was also salaried by the government), the vocational expert (he was paid per diem), the psychiatrist (he was paid per diem, also) and the poor claimant and the undersigned. Actually, we were the only two there that could not afford (financially) to be there, yet, we were not being paid by anyone. Moreover, unless we could overcome the abundance of government evidence, we would be paid nothing. Inasmuch as this occurred in another jurisdiction from the one where our services are normally requested, I question whether the "man" takes all of this into consideration.

Now to the meat of this letter. Gentlemen, I refuse to complete your form for fee approval.

We recently assisted a claimant in processing his claim. He wanted to pay us per our contract. We explained the procedures erroneously adopted by the Secretary and the restrictions. He wanted to "slip it in our pocket," asserting, "No one will know." (Carl C. Walker, 235-07-2540). He didn't know he was violating the law. We refused.

As we read the law, (which we have already stated we feel to be an infringement on the rights of parties to contract with one another), it simply directs the Secretary to provide "maximum fees" to be charged by representatives in Social Security cases - - not to scrutinize the contract and the work done thereunder.

January 29, 1969

Page No. 6

Certainly there are many attorneys who are willing to assist the indigents in their quest for disability benefits. However, we feel compelled to withdraw our services because of the socialistic attitudes which have been forced upon us by the power in Washington.

The "law" herein discussed is mocked and attacked. Query, is this unusual? Today, because of the irresponsible application of our laws, responsible elements of our society, educators, doctors, clergy - - all elements, urge us to break the laws we do not like. Many organized groups defy the law, often with immunity, and to some extent are protected in so doing by the lawmakers. We do not intend to break the law.

We feel, as the records will reflect, you owe us for services already rendered, a sum equalling twenty-five percent (25%) of past due benefits in the following cases:

234-28-2091 HC	(\$791.67)
235-05-2540	(?)
236-05-0775	(\$458.12)
235-10-6743	(?)

We look forward to receiving your check representing the total amount due, promptly.

Maybe you Gentlemen recall the quote:

"The man who once most wisely said,
Be sure you are right, then go ahead,
May have added this, to-wit:
Be sure you are wrong before you quit."

Obviously, I am wrong; therefore, I quit.

Very truly yours,

JAMES H. COLEMAN

JHC/ps

cc: Honorable Robert C. Byrd
Honorable John Slack
Various Departments of Social Security Administration



**PETITION TO OBTAIN APPROVAL OF A FEE
FOR REPRESENTING A SOCIAL SECURITY CLAIMANT**
(Please note information on the reverse)

DO NOT WRITE IN THIS SPACE

Fees Approved \$ _____
Approving Officer: _____

I request approval to charge a fee of \$ _____ for services performed as a representative of _____ in a claim before the Social Security Administration.

ENTER NAME OF PERSON ON WHOSE SOCIAL SECURITY RECORD CLAIM IS BASED

ENTER THE SOCIAL SECURITY NUMBER OF PERSON
ON WHOSE RECORD CLAIM IS BASED

THE INFORMATION BELOW IS FURNISHED IN SUPPORT OF THIS PETITION

1. My services as a representative began _____ and ended _____.
(Date) (Date)

- | | |
|----|-------------------------------------------------------------------------------------------------|
| 2. | Itemization of Services Rendered (Do not include services in connection with court proceedings) |
|----|-------------------------------------------------------------------------------------------------|

DATE	(Itemize each meeting, conference, item of correspondence, telephone call, and each activity engaged in, such as research, preparation of a brief, attendance at a hearing, travel, etc., related to your services as representative in this case.)	TIME SPENT (To Nearest Quarter Hour)
	If more space is needed, attach separate sheet.	TOTAL HOURS

3. Did you render any services relating to this matter before any State or Federal court? ☐ Yes ☐ No
If "Yes," what fee did you or will you charge for services in connection with the court proceedings? \$ _____

4. Have you and your client tentatively agreed upon a fee for your services? ☐ Yes ☐ No
If "Yes," please specify the amount (or the agreed-upon formula). \$

5. Have you received, or do you expect to receive, any payment for your representation other than the fee indicated above, such as reimbursement for expenses you incurred? If "Yes," itemize below: ☐ Yes ☐ No

§
§
§
§

I certify that the above information is true and correct to the best of my knowledge and belief. I further certify that I have furnished a copy of this petition and any attachments to the person(s) for whom the above services were performed.

SIGNATURE OF PETITIONER

DATE

ADDRESS

FIRM WITH WHICH ASSOCIATED, IF ANY

TELEPHONE NO. AND AREA CODE

INSTRUCTIONS FOR USING THIS PETITION

An attorney, or other representative, who wishes to charge a fee for services rendered in connection with a claim before the Social Security Administration, is required by law to obtain approval of the fee from the Social Security Administration (section 206(a) of the Social Security Act; Social Security Administration Regulations No. 404.975).

This form (SSA-1560) elicits the information required to be submitted in support of fee petitions. It should be completed after the representative's services have been completed, and the original, third and fourth carbon copies filed with the office of the Social Security Administration which took the latest action on the claim. The representative is required to furnish a copy (first carbon) of this petition to the claimant for whom the services were rendered. The second carbon copy should be retained by the representative.

Social Security Administration approval of a fee is *not* required where the fee is for services (1) rendered in an official capacity such as that of legal guardian, committee, or similar court-appointed office and the court has approved the fee in question, (2) in representing the claimant before a court of law, or (3) in representing the claimant in a claim for reimbursement of medical expenses exclusively handled by a private intermediary.

Where a representative has rendered services in a claim before the Social Security Administration and a court of law, the regulations require that he specify what, if any, amount of the fee he desires to charge is for services performed before the Administration. If he charges any fee for services, he must petition for approval of that amount. In this connection, services before the Administration on a claim which has been remanded by a court to the Administration for redetermination are services before the Administration.

AUTHORIZATION OF FEE

The social security regulations contemplate that a representative will receive fair value for his services consistent with the purposes of the social security program, one of which is to give a measure of security to retired people, the disabled, dependent spouses,

parents and children. In approving a requested fee, the Administration considers the nature and type of services performed, the complexity of the case, the level of skill and competence required in rendition of the services, the amount of time spent on the case, the results achieved, the level of administrative review to which the representative carried the claim and the amount of the fee requested by the representative. When a fee is authorized, both the representative and the claimant are notified and allowed 30 days in which to request an administrative review in case of disagreement.

PAYMENT OF FEES

Basic liability for payment of a representative's fee rests with the claimant. However, if the representative is an attorney at law and there are past-due benefits awarded to the claimant under title II of the Social Security Act, a portion of the past-due benefits will be paid to the attorney toward payment of the fee. Such payment will be in an amount equal to whichever is the smallest: (1) the amount of the authorized fee; (2) 25 percent of the past-due benefits for months prior to the month in which the favorable determination was made on the claim; or (3) in cases decided below the court level, any amount that may have been agreed upon by the attorney and claimant as the fee for the attorney's services. The law does not permit direct payment to representatives except as indicated above; thus, if the representative is not an attorney at law (or there is an insufficient amount of back benefits to cover an attorney's fee) the representative must look to the claimant for payment after his fee has been authorized by the Administration.

PENALTY FOR CHARGING UNAUTHORIZED FEE

Any representative who charges or collects an unauthorized fee for services performed in connection with a social security claim, including services before a court which has rendered a favorable determination, may be subject to prosecution under section 206 of the Social Security Act which provides that such individual, upon conviction thereof, shall for each offense be punished by a fine not exceeding \$500 or by imprisonment not exceeding one year, or both.



**PETITION TO OBTAIN APPROVAL OF A FEE
FOR REPRESENTING A SOCIAL SECURITY CLAIMANT**
(Please note information on the reverse)

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Fee Approved \$____
Approving Officer:

I request approval to charge a fee of \$ _____ for services performed as a representative of _____ in a claim before the Social Security Administration.

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	If more space is needed, attach separate sheet.	TOTAL HOURS

If more space is needed, attach separate sheet. TOTAL HOURS

- | | | | |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------|-----------------------------|
| Did you render any services relating to this matter before any State or Federal court?
If "Yes," what fee did you or will you charge for services in connection with the court proceedings? | | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| | | \$ | |
| 4. | Have you and your client tentatively agreed upon a fee for your services?
If "Yes," please specify the amount (or the agreed-upon formula). | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| | | \$ | |
| 5. | Have you received, or do you expect to receive, any payment for your representation other than the fee indicated above, such as reimbursement for expenses you incurred? If "Yes," itemize below: | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| | | \$ | |
| | | \$ | |
| | | \$ | |
| | | \$ | |
| TOTAL | | \$ | |

I certify that the above information is true and correct to the best of my knowledge and belief. I further certify that I have furnished a copy of this petition and any attachments to the person(s) for whom the above services were performed.

SIGNATURE OF PETITIONER

GATE

ADDRESS

FIRM WITH WHICH ASSOCIATED, IF ANY

TELEPHONE NO. AND AREA CODE

NOTICE TO SOCIAL SECURITY CLAIMANT

This is a copy of a petition which has been filed by your representative with the Social Security Administration requesting approval to charge a fee for services performed in connection with your social security claim. If you have any questions about any statement in the petition, you should get in touch with your Social Security Administration District Office at once, and no later than 10 days from the date of this petition. If you prefer you may direct your questions in writing to the last office which took action in your case. Unless your claim went before the Bureau of Hearings and Appeals this would be the reviewing office whose address appears on your notice of award or disallowance.

If the last determination in your case was made by a hearing examiner of the Bureau of Hearings and Appeals, you may direct any questions you may have to the hearing examiner who notified you of his determination. If the last action was taken by the Appeals Council of the Bureau of Hearings and Appeals, you may direct your

questions to the Bureau of Hearings and Appeals, P.O. Box 2518, Washington, D.C. 20013. In any event, please be sure to act promptly so your questions will reach the appropriate office within 10 days.

You will be informed in writing regarding the amount of fee your representative is authorized to charge you based on this petition. If your representative is an attorney at law, the law requires that a portion of any past-due benefits payable to you under title II of the Act be used toward the payment of your attorney's fee. In no case will the amount paid to your attorney directly by the Social Security Administration exceed whichever of the following amounts is the least: (1) 25 percent of the past-due benefits resulting from the claim, (2) the amount of fee authorized, or (3) any amount which you and your attorney may have agreed upon as the fee for his services (as shown in item 4 of the petition on the reverse side).



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- | | | |
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| | | \$ _____ |
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| | | \$ _____ |
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<i>If more space is needed, attach separate sheet.</i>	TOTAL HOURS	

Did you render any services relating to this matter before any State or Federal court?
If "Yes," what fee did you or will you charge for services in connection with
the court proceedings?

☐ Yes ☐ No

§ _____

4. Have you and your client tentatively agreed upon a fee for your services?
If "Yes," please specify the amount (or the agreed-upon formula).

☐ Yes ☐ No

3

5. Have you received, or do you expect to receive, any payment for your representation other than the fee indicated above, such as reimbursement for expenses you incurred? If "Yes," itemize below:

☐ Yes ☐ No

§

§

§

TOTAL	5
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I certify that the above information is true and correct to the best of my knowledge and belief. I further certify that I have furnished a copy of this petition and any attachments to the person(s) for whom the above services were performed.

SIGNATURE OF PETITIONER

DATE

ADDRESS

FIRM WITH WHICH ASSOCIATED, IF ANY

TELEPHONE NO. AND AREA CODE

GOLDHAMMER & KAUFMAN

ATTORNEYS AT LAW

6380 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90048

October 2, 1973

Senator John V. Tunney
United States Senate
Washington, D. C.

Dear Senator Tunney:

I read with great interest in the October 2nd issue of the Metropolitan News concerning your investigation of attorney fees. Our firm is uniquely supported by private fees while concentrating upon "low-income cases" -- Social Security, Civil Service, welfare claims, pension rights, etc.

The state of the law with respect to veterans' claims is almost unbelievable. Because of my repute in the area of Social Security claims, I receive at least one or two phone calls a month concerning veterans' disability claims. I have represented a few veterans on a pro bono (without fee) basis. By and large, I have found that the claims brought to my attention were meritorious and were in need of counsel, and that such claims succeeded with counsel.

Veterans' organizations act almost as another arm of the Veterans' Administration. I have had many a client tell me that he went to a veterans organization for help and was told: Well, if the Veterans' Administration turned you down, it must be right. Veterans' cases are complicated -- the claimant tends to wind up fighting his own veterans' organization representative as well as the Veterans' Administration and the claimant is ill equipped to do so. Veterans' claims involve rather intricate apportionment between service-connected and non-service connected percentages of disability. The claimant cannot cope with the regulations and statutes involved. At present, I don't see how a private attorney can represent a veteran. The law is quite clear in its practical prohibition of private attorneys. In my experience, legal aid organizations, at least in Los Angeles, will not represent veterans because such cases are too complicated to warrant training an attorney for such representation. I am not at all sure that such cases are all that complicated but I have received rather negative reactions in attempting to refer veterans to legal aid organizations. In any event, legal aid is not the answer because veterans'

Senator John V. Tunney
October 2, 1973
Page Two

cases should be renumeration. There is no reason for a veteran to feel that he can't "afford" counsel. Fees should be reviewed in veterans' cases in the same way as the Social Security Administration reviews fees in Social Security cases. A veteran could thus obtain an attorney on a contingent basis. In veterans' claims, a veteran needs legal assistance and veterans' organizations are no substitute for a motivated attorney.

I appreciate your consideration of the above. I engage in practice in the areas of Social Security and welfare litigation and understand that your committee is also investigating such areas. I would be happy to provide further thoughts if you so desire.

Thank you for your time and attention.

Sincerely,

ALAN GOLDHAMMER

AG/caa

JACOBSON, SODOS AND MELNICK
ATTORNEYS AND COUNSELORS AT LAW
SUITE 216
152 WEST WISCONSIN AVENUE
MILWAUKEE, WISCONSIN 53203

PHONE (414) 271-2302

October 4, 1973

Senator John Tunney
United States Senate
Washington, D.C.

Dear Senator Tunney:

I note that you will be chairing a committee to investigate the effect of Bar Association legal fees upon the poor and average citizen to obtain justice.

Since the middle 1960's I have actively fought against a legal system which I firmly believe discriminates against the average citizen and the poor.

In 1967 I served as Special Assistant Attorney General in the area of consumer affairs for the State of Wisconsin and developed a comprehensive consumer program for the State citizenry in order to handle consumer complaints at the State level. In private practice I have handled numerous consumer cases challenging the legal system which in fact does discriminate against the average working person and the poor. The case of Sniadach v. Family Finance Corporation of Bayview which went to the United States Supreme Court and ultimately resulted in garnishment before judgment being declared unconstitutional was a case that I handled commencing in the lower courts here in Milwaukee and proceeded through the Court System to the United States Supreme Court. In addition, at the State level, I have handled many cases which were examples of the legal system and its oppressiveness when it comes to consumers and average working people handling their cases through the courts.

I am enclosing a brief in one such case where part of the argument relates to the effect of the fee structure on appeals in small claims cases and how they effect the average working

Senator John Tunney

-2-

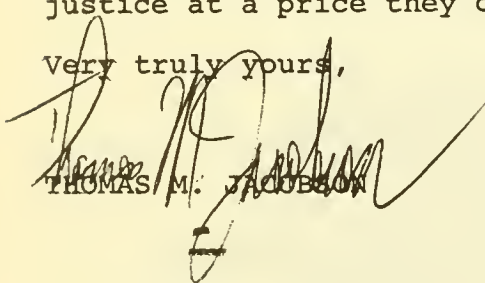
October 4, 1973

person and the consumer. I have also handled numerous cases which have resulted in contracts for credit clothing companies being declared unconscionable and unenforceable and I will be glad to provide you with copies of the pleadings and decisions in such cases. The Court in one decision stated to enforce the provisions of the contract would be like applying the inquisition and the rack against consumers.

If I can be of any assistance when your hearings take place in terms of testimony as to actual case examples of how the system works against consumers as to legal fee oppressiveness I would be most happy to accommodate you and your committee. I am enclosing an autobiographical sketch for your further consideration.

I wish you a most fruitful hearing and look forward to meaningful legislation to correct what I consider to be legal abuses as to consumers and average working people being able to get justice at a price they can afford to pay.

Very truly yours,



THOMAS M. JACOBSON

Enclosures

STATE OF WISCONSIN
IN SUPREME COURT

August Term, 1908

No. 355

HERBERT A. WILLIAMS,

Plaintiff-Respondent,

-VS-

RANK AND SON BUICK, INC.,

Defendant-Appellant.

RESPONDENT'S BRIEF

THOMAS M. JACOBSON
110 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

Attorney for Respondent.

INDEX AND SYNOPSIS OF ARGUMENT

	<u>Page</u>
NATURE OF THE CASE	1
QUESTION INVOLVED	2
STATEMENT OF FACTS	3
ARGUMENT	5
I. IN A TRIAL TO THE COURT, THE COURT'S FINDINGS OF FACT MAY NOT BE SET ASIDE ON APPEAL UNLESS CONTRARY TO THE GREAT WEIGHT AND CLEAR PREPONDERANCE OF THE EVIDENCE	5
II. A PERSON WHO IS REQUIRED TO HIRE AN ATTORNEY TO DEFEND HIS SMALL CLAIMS JUDGMENT AGAINST A NON- MERITORIOUS APPEAL TO THE WISCONSIN SUPREME COURT SHOULD BE AWARDED A REASONABLE ATTORNEY FEE	9
CONCLUSION	19

CASES CITED

- Ace Associates v. Nagy (1961),
 13 Wis. 2d 612, 109 N.W. 2d 359 5, 8, 9

	<u>Page</u>
Bell v. School Board of Powhatan County (4th Cir. 1963), 321 F. 2d 494	13
Brotherhood of Railway Trainmen v. Virginia (1964), 377 U.S. 1, 84 S. Ct. 1113	16, 17
Chambers v. Baltimore and Ohio R.R. Co. (1907), 207 U.S. 142, 28 S. Ct. 34	16
Estate of Fillar (1960), 10 Wis. 2d 141, 102 N.W. 2d 210	5
Estate of Fuller (1957), 275 Wis. 1, 81 N.W. 2d 64	5
First National Bank in Oshkosh v. Scieszinski (1964), 25 Wis. 2d 569, 131 N.W. 2d 308	5
Gilbert v. Hoisting and Portable Engineers (1964), 237 Ore. 139, 390 P. 2d 320	14
Johnson v. Avery (February 24, 1969), 37 U.S. Law Week 4128	17
Industrial Credit Co. v. Dienges (1968), 38 Wis. 2d 328, 156 N.W. 2d 479	10
Madison v. Geier (1965), 27 Wis. 2d 687, 135 N.W. 2d 761	7
Malloy v. Carroll (1934), 287 Mass. 376, 191 N.E. 661	14

	<u>Page</u>
McCluskey v. Thranow (1966), 31 Wis. 2d 245, 142 N.W. 2d 787 ...	5, 6, 9
Rolax v. Atlantic Coast Line R.R. (4th Cir. 1951), 186 F. 2d 473	13
Schroeder v. City of New York (1962), 371 U.S. 208, 83 S. Ct. 279	17
United Mine Workers v. Ill. State Bar Asso. (1967), 389 U.S. 217, 88 S. Ct. 353	16
Vaughan v. Atkinson (1962), 369 U.S. 527, 82 S. Ct. 997	13, 14
Walker v. Grand International Brother- hood of Locomotive Engineers (1938), 186 Ga. 811, 199 S.E. 146	14
Weber v. Marine Cooks' and Stewards' Asso. (1949), 93 Cal. App. 2d 327, 208 P. 2d 1009	14

CONSTITUTION

United States Constitution

First Amendment 15

Fourteenth Amendment 15, 16, 17

Wisconsin Constitution

Article 1, Section 4 15

Page

Article 1, Section 9	15
----------------------------	----

TEXTS

Consumer's Advisory Council, New York City Department of Consumer Affairs, Report on the Uniform Con- sumer Credit Code 8 (1969)	12
6 Moore's Federal Practice 1352	13
"Translating Sympathy for Deceived Consumers Into Effective Programs for Protection", 114 U. Pa. L. Rev. 395	12
Wisconsin Jury Instructions-Civil, Comment to Instruction Number 2400	9
Wisconsin State Bar Minimum Fee Schedule	10
Wright "The Courts Have Failed the Poor", New York Times Magazine, March 9, 1969	11
Zimroth "Group Legal Services and the Constitution", 76 Yale L. J. 966	16

STATE OF WISCONSIN
IN SUPREME COURT

August Term, 1968

No. 355

HERBERT A. WILLIAMS,

Plaintiff-Respondent,

-vs-

RANK AND SON BUICK, INC.,

Defendant-Appellant.

RESPONDENT'S BRIEF

NATURE OF THE CASE

This is an appeal from an Order of the Circuit Court for Milwaukee County, Robert M. Curley, presiding, dated January 3, 1969 (R. 27-29, A-Ap. pp. 105-106) affirming a judgment in the amount \$150.00 plus costs and disbursements, entered on August 12, 1968, in the County Court for Milwaukee County, Charles E. Kading, Acting County Judge, presiding (R. 13-17, A-Ap. pp. 101-104).

QUESTION INVOLVED

Was the Trial Court's findings of fact contrary to the great weight and clear preponderance of the evidence?

The Appellate Court below answered No.

STATEMENT OF FACTS

Respondent testified on March 21, 1968 he and his brother went to Appellant's used car lot to look at an automobile Appellant had advertised in the newspaper. (R. 39-41, A-Ap.pp. 112-113). After taking the automobile for a drive Respondent purchased the 1964 Chrysler Imperial. The sales agreement was identified as Exhibit No. 3 and was dated March 21, 1968. (R. 42 and 78, A-Ap.p. 113). In fact the sales agreement motor vehicle purchase contract was dated March 19, 1968 and identified as Exhibit No. 4 (R. 46 and 79, A-Ap.p. 114). Respondent thought the invoice identified as Exhibit No. 3 was a sales agreement (R. 42, A-Ap.p. 113). Respondent testified the reason he bought the car was because it was a Chrysler Imperial and it had air conditioning (R. 43, A-Ap.p. 113). Thomas Conley, used car manager of Rank and Son, identified Exhibit No. 2 as an ad of Rank and Son (R. 64-65, 79, A-Ap.p. 119). Mr. Conley admitted Rank and Son did not have such an advertised car on their lot during the period March 19, 20, 21 (R. 64-65, A-Ap.p. 119). Bruce Andrews, service manager for Shorewood Chrysler-Plymouth, testified the installation of an air conditioning system in a 1964 Chrysler Imperial is \$325.00 (R. 35, A-Ap.p. 111). The Trial Court in a written decision dated August 9, 1968 found that the Respondent had proven fraud against the Appellant and awarded him damages of \$150.00 plus his costs and disbursements (R. 13-17, A-Ap.pp. 101-104). The Circuit Court in a memorandum decision dated January 3, 1969 concluded that the Trial Court findings of fact were sustained by clear, satisfactory and convincing evidence and therefore affirmed the

judgment with costs of \$50.00 awarded to the Respondent (R. 27-29, A-Ap. pp. 105-106). Appellant appealed to the Wisconsin Supreme Court from this Order on January 23, 1969 (R. 80).

ARGUMENT

I.

IN A TRIAL TO THE COURT, THE COURT'S FINDINGS OF FACT MAY NOT BE SET ASIDE ON APPEAL UNLESS CONTRARY TO THE GREAT WEIGHT AND CLEAR PREPONDERANCE OF THE EVIDENCE.

The Wisconsin Supreme Court, in Ace Associates v. Nagy (1961) 13 Wis. 2d 612, 109 N.W. 2d 359, at p. 613 stated:

This is a fact case. In a trial to the court, the court's findings of fact may not be set aside on appeal unless contrary to the great weight and clear preponderance of the evidence. The trier of the fact is the judge of the credibility of the witness and the weight of the testimony and the inferences to be drawn from the evidence. Estate of Fuller (1957) 275 Wis. 1, 81 N.W. 2d 64; Estate of Fillar (1960) 10 Wis. 2d 141, 102 N.W. 2d 210.

The case before the trial court was a small claims action and therefore Respondent need prove its case by clear and convincing evidence. First National Bank in Oshkosh v. Scieszinski (1964) 25 Wis. 2d 569, 131 N.W. 2d 308.

Accepting McCluskey v. Thranow (1966) 31 Wis. 2d 245, 142 N.W. 2d 787 as authority for the elements to establish misrepresentation to be fraudulent Respondent submits the trial court's findings of fact are not contrary to the great weight

and clear preponderance of the evidence. Agreeing with the Respondent the Circuit Court in Milwaukee County, Honorable Robert M. Curley, presiding, after careful examination of the memorandum decision signed and filed by the trial court Judge concluded that the trial court findings of fact were sustained by clear, satisfactory and convincing evidence (R. 27-29, A-Ap.pp. 105-106).

The elements set out in McCluskey v. Thranow, supra, are as follows:

A. A STATEMENT OF FACT WHICH IS UNTRUE.

The Honorable Charles E. Kading, presiding Acting County Judge, the trier of fact below set forth the advertisement on page one of his opinion:

"64 CHRYSLER Imperial 2 door hardtop; silver mist with black vinyl interior; full power, including FACTORY AIR CONDITIONING; there aren't many around like this. See, drive, you'll buy . . . \$1,599." (R. 13, A-Ap.p. 101).

Thomas Conley, used car manager of Rank and Sons, stated such an advertised automobile did not exist on the Rank and Son auto lot at the time material herein (R. 64-65, A-Ap.p. 119).

B. THAT SUCH STATEMENT OF FACT WAS MADE WITH INTENT TO DEFRAUD AND FOR THE PURPOSE OF INDUCING THE OTHER PARTY TO ACT UPON IT.

The highlighting of the untrue statement in the advertisement speaks for itself.

C. THAT RESPONDENT DID IN FACT RELY ON THE UNTRUE STATEMENT AND WAS INDUCED THEREBY TO ACT, TO HIS INJURY OR DAMAGE.

In the case of Madison v. Geier (1965) 27 Wis. 2d 687, 135 N.W. 2d 761, at p. 697, the Wisconsin Supreme Court said:

The inferences to be drawn from the observable facts is for the trial court, and unless they are inherently impossible or unreasonable they should be accepted on appeal.

It was admitted by Carl Mickey, salesman for Rank and Son, that Respondent Williams came to the used car lot in response to a newspaper advertisement (R. 57-59, A-Ap.pp. 116-117). It was further admitted by defense witness Thomas Conley that the ad which was introduced into evidence referred to the automobile Respondent purchased (R. 62-65, A-Ap.pp. 118-119). Respondent Williams assertion that the advertisement he relied on was the same as that introduced in evidence was uncontroverted (R. 40-41, A-Ap.pp. 112-113). Thus there is no dispute that an ad was published, that the ad represented the auto in question as being equipped with factory air conditioning, and that in response to that ad Respondent Williams came to the Rank and Son used car lot. The only serious factual dispute in the case is whether Carl Mickey orally represented to Respondent that the automobile in question was equipped with factory air conditioning (R. 42-43, 55, 57, A-Ap.pp. 113, 116). In a trial to the court it is the court which has the duty of determining the veracity of witnesses, the

weight to be given to the evidence of such witnesses, and the inferences to be drawn. Ace Associates v. Nagy, supra, at p. 618. It must be assumed that the trial court believed Respondent Williams assertions as to the representations made by Carl Mickey regarding the automobile. Such belief is not unwarranted when we consider the clear evidence concerning the newspaper ad coupled with Mr. Mickey's rather unbelievable assertion that he made no sales pitch on the auto to the Respondent (R. 55, 57-59, A-Ap.pp. 116-117). Respondent testified what Carl Mickey stated as to the features in the '64 Chrysler Imperial and why he purchased the automobile (R. 42-43, A-Ap.p. 113). Respondent bought the automobile mainly because it was a Chrysler Imperial and that it had air conditioning (R. 43, A-Ap.p. 113). Respondent further stated why after inspecting the '64 Chrysler Imperial he believed the air conditioning unit was in fact installed in said automobile (R. 43-44, A-Ap.p. 113).

Appellant raises the defense of honest mistake. Carl Mickey admitted Respondent stated he saw the price of the 1964 Chrysler Imperial on the day the purchase sale was transacted in a newspaper advertisement (R. 60, A-Ap.p. 117). The advertisement for a 1964 Chrysler Imperial introduced in evidence was dated March 21, 1968 (R. 40, A-Ap.p. 112). The ad must therefore have run for at least several days. Mr. Conley would have caught an error the day after same appeared according to the procedures he testified were followed regarding newspaper ad placements. (R. 61-63, A-Ap.pp. 118-119). The ad in question aside from highlighting the false representation also indicates: " . . . there aren't many around like this." (R. 13,

A-Ap.p. 101). Mr. Conley used almost indential language to describe the type car in question if in fact it had air conditioning as was falsely represented (R. 63, A-Ap.p. 119). Thus the trial court could clearly find the ad was drawn up in its entirety as a falsity by the Appellant. The evidence establishes that either there was no error but rather an intent to deceive or in fact a false representation was made. The comment to Instruction Number 2400 of Wisconsin Jury Instructions-Civil places liability on the Appellant if the representation proves to be false as is the case herein.

The inferences from the uncontroverted assertions of Respondent Williams, the admissions of both defense witnesses, and the ad itself with the highlighting of the false representation clearly establish the elements set out in McCluskey v. Thranow, supra. In order to justify a reversal, the trial court's findings of fact must be against the great weight and clear preponderance of the evidence. Ace Associates v. Nagy, supra. Respondent respectfully submits Appellant has not made such a showing to warrant a reversal in the instant proceedings.

II.

A PERSON WHO IS REQUIRED TO HIRE AN ATTORNEY TO DEFEND HIS SMALL CLAIMS JUDGMENT AGAINST A NON-MERITORIOUS APPEAL TO THE WISCONSIN SUPREME COURT SHOULD BE AWARDED A REASONABLE ATTORNEY FEE.

Respondent was awarded \$150.00 by the Milwaukee County Small Claims Court. Appellant

appealed this decision to the Milwaukee County Circuit Court and then to the Supreme Court. Respondent, who is already obligated to pay his attorney \$50.00 of his \$150.00 (on a contingent fee basis), is required to continue to retain counsel for the appeal to the Supreme Court. As Respondent has already demonstrated, the appeals were groundless.

But the appeals raise another very serious issue. At a minimum, the cost of defending Respondent's judgment against these groundless appeals is \$923.00. According to the recommended minimum fee schedule of the Wisconsin State Bar, the minimum appearance fee in this Court is \$250.00. In addition, the minimum hourly costs for the required brief and for preparation and argument amount to 25 hours at \$25.00 per hour for a total amount \$625.00, and travel time and expenses are \$30.00 and \$18.00 respectively. This cost must be borne either by the Appellant, the Respondent, or absorbed by the Respondent's attorney. Justice and the state and federal constitutions require that the Appellant bear the full cost of its appeal.

It would be absurd if Respondent were required to spend \$923.00 to defend in this Court his right to a \$150.00 judgment which was upheld in the Circuit Court. Only a very wealthy man who could afford to litigate as a matter of principle could protect himself against non-meritorious appeals if such a rule were law. Justice Robert W. Hansen dissenting in Industrial Credit Co. v. Dienges (1968) 38 Wis. 2d 328, 156 N.W. 2d 479 at pp. 330-331 stated:

" . . . Here the stake of respondent in the outcome clearly does not justify the expense involved in participating in the appeal. The respondent is in the position of Mr. In-Between. He has no claim to an indigency status that would make available to him the services of a legal aid society, Judicare or a neighborhood law center. He is not in the category of the very well off who can afford litigation no matter how slim the benefits of a favorable outcome."

Respondent is a self employed barber (R. 39, A-Ap. p. 112). He is "Mr. In-Between", neither wealthy enough to spend hundreds of dollars to establish empty rights, nor poor enough to be eligible for charitable legal aid. If he is required to pay his attorney, he simply loses either his judgment or a sum of money many times the value of his judgment.

As Judge J. Skelly Wright recently put it, "Even the indigent fortunate enough to have a lawyer and win his lawsuit will be the loser in many cases because his legal fees will swallow up his modest recovery." Wright, "The Courts Have Failed the Poor," New York Times Magazine, March 9, 1969, p. 26 at 100.

Similarly, Respondent's attorney cannot be expected to absorb the costs out of his own pocket. He could do so in a few cases during the course of his career, as a service to the public. But private attorneys cannot regularly help citizens obtain the justice to which they are entitled if they must pay substantial sums of money for the privilege of doing so. If attorneys are expected to subsidize the costs of protecting their clients from non-meritorious

appeals from judgments of small claims courts, few citizens will be able to find attorneys to represent them in such appeals.

"Consumer frustration is common because the law gives the buyer the right to full compensation if he has been cheated, or if his merchandise does not live up to the representations made, but usually does not provide him with any way to obtain redress. Even the buyer who is aware that he has rights generally requires an attorney to vindicate them. Yet most attorneys will not accept cases involving small claims, because it costs nearly as much to win a hundred dollar claim as a thousand dollar claim. And rare is the consumer who can afford to pay a lawyer more than the lawyer recovers from the other side, just to see justice done. The number of consumers having no redress because the amount lost is not commensurate with the attorney's fee constitutes the vast majority." Consumers' Advisory Council, New York City Department of Consumer Affairs, Report on the Uniform Consumer Credit Code 8 (1969), citing Comment, "Translating Sympathy for Deceived Consumers Into Effective Programs for Protection," U. Pa. L. Rev. 395, 409.

The only just solution is to impose the expense of Supreme Court appeals in small claims cases on the party which causes the expense. Any other resolution would enable companies to avoid consumers' demands for fair treatment by threatening to "outlitigate" the consumer if he should be so foolish as to insist on vindicating his rights in court.

A. THE POWER OF THE COURT.

Although the issue of awards of reasonable attorney fees for small claims appeals is a new one in Wisconsin, other jurisdictions have held the award of such fees to the prevailing party to be within the inherent power of the Courts, requiring no statutory provision. The federal courts have blazed the trail for others to follow in such cases as Bell v. School Board of Powhatan County (4th Cir. 1963) 321 F. 2d 494 and Rolax v. Atlantic Coast Line R.R. (4th Cir. 1951) 186 F. 2d 473. These cases authorized an award of attorney fees to a prevailing plaintiff where a defense is maintained "in bad faith, vexatiously, wantonly, or for oppressive reasons." 6 Moore's Federal Practice 1352. Similarly, in Vaughan v. Atkinson (1962) 369 U.S. 527, 82 S. Ct. 997 a seaman's claim for maintenance and cure was ignored for two years by the owner of his ship, and the seaman was forced to hire an attorney on contingent fee basis to prosecute his claim in court. The United States Supreme Court held a reasonable attorney's fee to be recoverable as part of the "damages" caused by the defendant.

State Courts have also recognized that unless attorney fees are awarded to the prevailing side where the amount in controversy does not justify a contingent fee, important rights will not be enforceable. For example, in Oregon, union members who succeed in suing union officers guilty of wrongdoing are entitled (by virtue of the inherent power of the courts, rather than any enabling legislation) to attorney fees both at the trial level and on any necessary appeal. "If those who wish to preserve the internal democracy of the union are required

to pay out of their own pockets the cost of employing counsel, they are not apt to take legal action to correct the abuse." Gilbert v. Hoisting and Portable Engineers (1964) 237 Ore. 139, 390 P. 2d 320. Similarly, the prevailing party is entitled to attorney's fees "where there are other circumstances in which equitable relief would in effect be denied or severely inhibited unless the plaintiff who prevails in the suit is awarded attorneys' fees." Ibid.¹ See also Weber v. Marine Cooks' and Stewards' Asso. (1949) 93 Cal. App. 2d 327, 208 P. 2d 1009; Walker v. Grand International Brotherhood of Locomotive Engineers (1938) 186 Ga. 811, 199 S.E. 146; Malloy v. Carroll (1934) 287 Mass. 376, 191 N.E. 661.

¹ Gilbert was an equity case, and the Oregon courts have not had occasion to apply the rule to an instance in which legal relief was sought. But particularly since the merger of law and equity, there seems to be no good reason to distinguish, for purposes of awarding counsel fees, between demands for equitable relief and demands for damages where small claims are involved. Indeed, at least three jurisdictions have held that where justice so requires, the courts may award attorneys' fees as part of damages occasioned by a defendant who had to be taken to court. Vaughan v. Atkinson (1962) 369 U.S. 527, 82 S. Ct. 997; Walker v. Grand International Brotherhood of Locomotive Engineers (1938) 186 Ga. 811, 199 S.E. 146 (counsel fees may be included in damages where defendant "has caused the plaintiff unnecessary trouble and expense"); Malloy v. Carroll (1934) 287 Mass. 376, 191 N.E. 661 (necessary to employ counsel to obtain redress).

We believe that the courts of Wisconsin are equally aware of the burning reality that there is no justice where a remedy is in fact unavailable to a person entitled to it, and that counsel fees for Supreme Court Appeals in small claims cases are essential to providing real justice to persons with small claims. In fact, the Wisconsin State Constitution, Article 1, Section 9, encourages the courts to provide realistic remedies for violations of substantive rights:

Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws.

B. THE CONSTITUTIONAL RIGHT TO COUNSEL FEES.

It is not only just and within the power of the court to award Respondent a reasonable counsel fee; it is also Respondent's Constitutional right under Article 1, Section 4, Wisconsin Constitution and the First and Fourteenth Amendments to the Federal Constitution. The simple fact of the matter is that if it costs \$1,023.00 (\$50.00 contingent fee, plus \$50.00 awarded by the court below, plus \$923.00 in this Court) to successfully litigate a claim for \$150.00 small claimants will be denied their day in court. They would thereby be denied their right to petition the courts guaranteed by the First and Fourteenth Amendments.

Litigation is a form of political expression, even when the relief sought is money damages. Brotherhood of Railway Trainmen v. Virginia (1964) 377 U.S. 1, 7, 84 S. Ct. 1113; United Mine Workers of America, District 12 v. Illinois State Bar Association (1967) 389 U.S. 217, 88 S. Ct. 353.² It is therefore protected by the First Amendment as applied to the states by the Fourteenth Amendment.

Furthermore, the right to have one's case heard in a court -- which is effectively denied by a rule requiring prevailing small claimants to pay counsel fees even where that prohibits any recovery -- it also is "one of the most fundamental requisites" of procedural due process of law,³ protected by

2 "In Trainmen, where the litigation in question was, as here, solely designed to compensate the victims of industrial accidents, we rejected the contention made in dissent . . . that the principles announced in Button were applicable only to litigation for political purposes" United Mine Workers v. Ill. State Bar Asso., 389 U.S. at 223. See also Zimroth, "Group Legal Services and the Constitution" 76 Yale L.J. 966, 991: "there is nothing particularly radical about saying that litigation is a protected activity, that people have a right to litigate."

3 "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government." Chambers v. Baltimore and Ohio R.R. Co. (1907) 207 U.S. 142, 148, 28 S. Ct. 34.

the Fourteenth Amendment. Schroeder v. New York (1962) 371 U.S. 208, 212, 83 S. Ct. 279. These rights are protected against judicial rules of practice which impose difficult or impossible burdens on obtaining judicial relief. "The right to petition the courts cannot be so handicapped." Brotherhood of Railway Trainmen v. Virginia, supra at p. 7. A rule letting prohibitive counsel fees lie with the prevailing side in small claims cases constitutes an impossible burden on the right to litigate, and therefore can be justified only by a showing of an overriding or compelling counter-vailing interest. But no justification has been shown for keeping consumers with small claims out of court by denying them the ability to defend their judgment on appeal. In fact, in establishing small claims courts with a right of appeal, the State has enacted a policy of encouraging persons with small claims to be heard according to due process of law.

It may be argued that the prevailing rule as to attorneys' fees on appeal to this Court in small claims cases is not a direct obstacle to litigation, but only a deterrent to the use of the courts. However, the Supreme Court has laid to rest, in the cases cited above, the theory that a deterrent to the right to litigate is any less suspect than a direct obstacle. And only last month, the Supreme Court renewed its aversion to any effective burden on the right to have a day in court. In Johnson v. Avery, (February 24, 1969) 37 U.S. Law Week 4128, the Court held invalid a Tennessee rule which prohibited prisoners who were not lawyers from writing writs for their fellow inmates.

There, as here, the rule did not in theory bar a man from the exercise of his right to a day in court, but in practice it was nearly impossible to exercise that right without assistance and representation. The Court was not bothered by the fact that the interference with the right was indirect:

"There can be no doubt that Tennessee could not constitutionally adopt and enforce a rule forbidding illiterate or poorly educated prisoners to file habeas corpus petitions. Here Tennessee has adopted a rule which, in the absence of any other source of assistance for such prisoners, effectively does just that. The District Court concluded that 'For all practical purposes, if such prisoners cannot have the assistance of a "jailhouse lawyer" their possibly valid constitutional claims will never be heard in any court'." 37 U.S. Law Week at 4129 (emphasis added).

Similarly, if defrauded consumers with small claims are not entitled to attorneys' fees which they must expend to vindicate those claims, for all practical purposes they will be denied the right to litigate.

CONCLUSION

Respondent respectfully urges that the decision of the Court below be affirmed, and that Respondent be awarded costs and attorneys' fees which are reasonable in relation to the work which Respondent's counsel had to perform in this Court in order to vindicate Respondent's claim.

Respectfully submitted,

THOMAS M. JACOBSON

Attorney for Respondent.

OCT. 8, 1973

BESSEMER ALABAMA 35020

U.S. SENATOR JOHN V. TUNNEY D. CALIF.
WASHINGTON, D.C.

DEAR SIR:

I AM A VETERAN OF WORLD WAR 2. I HAVE BEEN TOTALLY DISABLED SINCE 8/31/71. THAT LEGAL FEE OF \$10.00 THE VETERANS ADMINISTRATION WILL PAY A LAWYER TO REPRESENT A VETERAN IS A LAUGHING MATTER. HE HAS TO REPRESENT HIS SELF GET A VFW OR LEGION SERVICE OFFICER OR THE VETERANS AFFAIRS OFFICER REPRESENTS A VETERAN. A VETERAN THERE FORE DOES NOT HAVE A CHOICE TO BE PROPERLY REPRESENTED. I THINK THE VETERANS ADMINISTRATION ARE IN DIRECT VIOLATION OF A VETERANS RIGHTS. THE VETERANS ADMINISTRATION IS NOT DEALING FAIR WITH VETERANS.

I THINK BEYOND ANY REASONABLE DOUBT, I PROVED MY CASE BEFORE THE APPEALS BOARD IN MY STATE. MY CASE WAS ALSO WENT TO WASHINGTON, D.C. IF MY CASE WERE DECIDED IN A COURT OF LAW INSTEAD OF THE VETERANS ADMINISTRATION IT WOULD HAVE BEEN DECIDED IN MY FAVOR, INSTEAD OF AGAINST ME. IF THEY HAD DONE THE RIGHT THING I WOULD BE RECEIVING MEDICAL ATTENTION AND A DECENT PENSION.

I RECEIVE \$252.50 MONTHLY SOCIAL SECURITY. I RECEIVE \$61.65 MONTHLY V.A. PENSION BENEFITS. THIS V.A. PENSION DOES NOT PAY FOR ALL MY DRUGS AND DOCTORS EACH MONTH. I HAVE ASKED FOR HELP IN MY MEDICAL CARE AND HAVE BEEN TURNED DOWN. RECENTLY I READ IN THE PAPERS WHERE YOU WERE GOING TO LIVE ON A \$1.25 FOR FOOD. THIS IS NOT COUNTING RENTS, UTILITIES PLUS DOCTORS AND DRUG BILLS. I DON'T HAVE TO ASK YOU HOW IT WAS. I ALREADY KNOW IT WAS IMPOSSIBLE.

I READ IN THE NEWSPAPER ABOUT THE HUGE FEES LAWYERS WERE RECEIVING FOR NOTHING IN REPRESENTING MINERS IN COLLECTING THEIR BLACK LUNG BENEFITS AT LEAST THATS WHAT YOU SAID AND I AGREE WITH YOU TOO. I HAVE BEEN TOLD THAT THIS IS THE RESULTS OF A BILL THAT WAS PASSED BY SENATOR JAMES ALLEN OUR OWN ALABAMA SENATOR. SENATOR TUNNEY I KNOW OF PEOPLE WORKING FOR THE MINES BUT TOP SIDE COLLECTING HUGE BENEFITS THEY NEVER WENT IN A MINE. I KNOW OF OTHERS THAT HAVE NOT WORKED IN A MINE IN 20 OR MORE YEARS, YET THEY ARE RECEIVING HUGE CASH SETTLEMENTS PLUS LARGE MONTHLY PENSIONS BENEFITS. DON'T GET ME WRONG IF THEY ARE ENTITLED TO IT I THINK THEY SHOULD RECEIVE IT.

THIS IS WHY I AM ASKING YOU TO TRY TO GET AN INVESTIGATION STARTED IN THE VETERANS ADMINISTRATION, FROM THE TOP ALL THE WAY TO THE BOTTOM. SOMETHING IS WRONG SOMEWHERE I BELIEVE WE VETERANS ARE SUPPOSE TO BE RECEIVING MORE HELP THAN WE ARE NOW RECEIVING. I DON'T THINK A VETERAN IS BEING TREATED LIKE HE SHOULD BE TREATED. THEY SAY THEY ARE DOING ALL THE LAW WILL LET THEM. I JUST CAN'T BELIEVE CONGRESS WOULD DO THIS TO MEN THAT HAVE FOUGHT FOR THEIR COUNTRY. I THINK WE ARE BEING TREATED LIKE DOGS. I HATE TO SAY IT BUT ITS TRUE.

WHAT IN THE WORLD IS WRONG WITH THE SENATE AND HOUSE OUR V.A. PENSIONS WERE CUT (12 MONTHS) AGO. THIS SAME BILL WAS BOTTLED UP IN CONGRESS THEN IN COMMITTEES AND NOT REPORTED OUT WHEN WE RECEIVED A 20% SOCIAL SECURITY RAISE. IS THIS THE TYPE PEOPLE REPRESENTING DISABLED VETERANS IN CONGRESS NOW.

I AM NOT ASKING FOR A REWARD, CHARITY, GRATITUDE. I AM DEMANDING THAT THE U.S. SENATORS AND U.S. REPRESENTATIVES IN OUR CONGRESS AND LAST BUT NOT THE LEAST THAT OUR PRESIDENT OF THE UNITED STATES STAND UP AND ASSUME ITS RESPONSIBILITIES TO ITS VETERANS AND DISABLED VETERANS, OF THE UNITED STATES OF AMERICA. AGAIN I WANT TO REMIND YOU THE MEN THAT FOUGHT IN THE WARS IS WHAT HAS MADE THIS A GREAT NATION, YET THESE SAME MEN ARE TREATED SO SHABBY.

COPY TO: PRESIDENT NIXON
SENATOR HARTKE
SENATOR PROXMIRE
SENATOR SPARKMAN
SENATOR ALLEN
REPRESENTATIVE VAN BYRON DORN
REPRESENTATIVE WALTER FLOWERS

THANK YOU:

P.S. I AM SO MAD MY BLOOD IS BOILING AT THIS TREATMENT WE VETERANS ARE RECEIVING.

I am so mad my blood is boiling at this treatment we veterans are receiving. I am so mad my blood is boiling at this treatment we veterans are receiving. I am so mad my blood is boiling at this treatment we veterans are receiving.

Raleigh, N. C. 27607
October 15, 1973

The Honorable John Tunney
United States Senate
Washington, D. C.

Dear Senator Tunney;

I have read with interest reports on your concern with the conduct of some members of the law profession.

My experiences with lawyers and courts in Kentucky prompts me to share an even deeper concern. Feeling that I had been victimized by a lawyer, who at the least was a vicious anti-semitic, and who has devoted a good bit of his time to bringing law suits against me in courts of no jurisdiction, simply to strike out at me, I complained twice to the Kentucky Bar Association.

Unbelievably I have never yet had a reply from that group, who are more concerned with their cash income than with justice.

My former wife fled the United States with a minor son, and in defiance of the courts reluctant order to return him to the court's jurisdiction has kept him in Honduras and refused to let me see him. Despite a court order finding her guilty of contempt, her Kentucky lawyer, one of 4 she had, 2 of whom I had to pay, filed suit through a fellow Kentuckian practicing law in the western part of North Carolina, for alimony payments.

My lawyer in this county contacted the lawyer in the western part of the state and explained to him that I had not resided at any time in that county, but was a bona fide resident of this county. None the less the Kentuckian lawyer in the western part of the state took the case to court, my lawyer got a change of court to here---and I got a bill for \$450!

My ex-wife failed to return a single item of personal property that her herd of lawyers and my one lawyer worked out. The judge when made aware of this dismissed it as being bric-a-brac! True enough- a lifetime collection of scholarly books, gifts from foreign governments I have helped.

The law profession is overdue for a cleaning up and an increase in responsiveness to the people at their mercy, whether poor or middle class.

Sincerely,

October 13th, 1973

Jamestown California 95327

Honorable John V. Tunney
UNITED STATES SENATOR
1415 Senate Office Building
Washington, D. C. 20510

Dear Senator Tunney:

Recently I read an editorial in the Los Angeles Times wherein you are heading up a Committee investigating the practices of attorneys in the United States.

I also understand that your Committee will be taking testimony from various individuals who have had both positive and negative relationships with attorneys. I would be most interested in submitting to your Committee my personal views in describing some unusual methods and ethics that attorneys have used insofar as prisoners are concerned. I am an inmate in a California prison, the Sierra Conservation Center is a medium/minimum facility, located in the Sierra foothills.

During the period of time I have been incarcerated I have had a number of dealings with privately retained attorneys and public defenders. A number of things relating to retainers and their payment would interest you along with the "deals" that are made. Sometimes the dealings a inmate has with an attorney is truly tragic! Large amounts of money is paid to a lawyer, for a specific service and due to the communication problems, often time no services are rendered whatsoever by the lawyer.

Then you have the radical attorney who is more interested in exploiting the prisoner and fomenting riots and disturbances. This I have all been witness to, Mr. Tunney, and I would be greatly interested in passing along to you my experiences and the experiences of others. I have a number of solid facts, with documents, records and transcripts.

I would be most interested in speaking or corresponding with you or a representative of your Committee. You may contact me at the above address.

Very truly yours,

FRANKLIN, MOORE, COOPER & WALSH

ATTORNEYS AT LAW

(A PROFESSIONAL CORPORATION)

CHARLES W. FRANKLIN
 JAMES E. MOORE
 WILLIAM H. COOPER
 M. O'NEAL WALSH

501 LOUISIANA AVENUE
 P. O. Box 3078
 BATON ROUGE, LOUISIANA 70821
 AREA CODE 504
 342-2603

October 15, 1971

Honorable John B. Tunney
 Representative
 Washington, D. C.

Dear Tunney:

This letter is addressed to you in your capacity as Chairman of the Subcommittee on Representation of Citizen Interests, as announced in the American Bar News.

My view is that there is a serious need for consideration by your committee of procuring attorneys for those groups unable to afford representation particularly as respects consumer grievances.

To a considerable extent, the "middle class" is unable to pay for the same kind of legal protection that the very poor and very rich will be able to obtain.

Lawyers' fees are necessarily rising because of rising costs, taxes, and so forth, to the point where the small businessman finds it difficult to pay for all the services he needs, not only legal services, but accounting services, and other professional services associated with the operation of his business.

The status and image of lawyers has certainly not been helped by the Watergate revelations, by the attitude of the Justice Department as to minimum fee schedules, and by a certain segment of the lawyers not as concerned with professional standards as they are with obtaining as many large fees as possible.

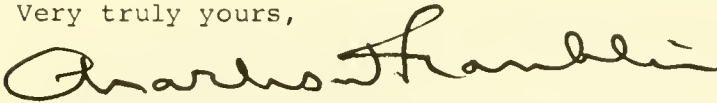
Honorable John B. Tunney
October 15, 1973

Page 2

Today's lawyer, who obtains recognized standards of efficiency, proficiency, and ability, has to be upgraded. That is something the ABA is trying to do and I am in favor of all the efforts of those who urge passage of a strong "National Legal Services Corporation Act."

The purpose of this letter is to suggest that your committee explore not only the needs of "poor people," but the needs of the middle class and small business people for professional services of a high professional caliber, without that being done on any socialistic basis.

Very truly yours,

A handwritten signature in cursive script, reading "Charles W. Franklin". The signature is fluid and elegant, with a large initial "C" and a long, sweeping underline.

Charles W. Franklin
CWF/ga

IRVIN OWEN
ATTORNEY AT LAW
TELEPHONE 275-1788
FEDERAL NATIONAL BUILDING
P O, DRAWER 758
SHAWNEE, OKLA 74801

October 23, 1973

Sen. John V. Tunney
United States Senate
Washington, D. C.

Dear Senator:

In your work on the sub-committee of the judiciary which seeks to broaden representation of citizens' interests, you are working in the right direction. The magnitude of the need almost staggers the imagination. I have now been engaged in listening at one end of a WATS line for approximately one month.

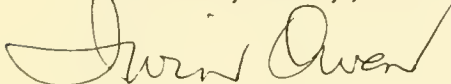
If you had any idea how an expenditure of \$200 solved over a hundred problems for people, you would be amazed. One dollar spent on this WATS line will go further than three hundred dollars on some existing programs.

We have no public help of any kind and would be pleased to have your idea of how this might be incorporated in new legislation to permit equitable distribution of legal services. In my case, I have 35 years experience in criminal matters, domestic matters and in consumer credit cases.

I am able to help in two cases out of three. I am saying that an experienced lawyer, at one end of a WATS line can do more in one hour than ten young inexperienced OEO attorneys can do. If your legislation would enable us to do a little advertising or even make small charges for what we do, it would solve the problem.

Please have your staff send me any available literature and in turn it might be possible for one of the Thorpe heirs to come to Washington and explain before a public meeting how this matter could be handled for the benefit of minority groups or poor people.

Yours very truly,



IRVIN OWEN

IO:au

The Jim Thorpe Estate

PHONE (405) 275-1788
P. O. DRAWER 758 417 FEDERAL NATIONAL BANK BUILDING
SHAWNEE, OKLAHOMA 74801

Hot Line Phone 800-522-2790

Legal Aid for Indians ... No Toll Charge in Oklahoma

The Jim Thorpe Estate is sponsoring a pilot project which has attracted nationwide interest. Any one of the 187,000 Indians in Oklahoma is now eligible to phone from anywhere in the state for free legal advice.

The results have been worthwhile. It is incredible to learn how people worry over matters needlessly. Problems which torment and fret an individual are magnified and distorted in the mind of one inexperienced in a certain area.

A competent lawyer is able to reassure and often suggest a course of action. It is astounding to discover the frequency one takes a legal problem to anyone except a lawyer.

The adage, "A little knowledge is a dangerous thing!" often applies when bankers, real estate men and other well intentioned people try to give legal advice.

Criminal charges register on a practical scale that reads from one to a thousand. Family and juvenile matters are devastating to a lone woman overwhelmed with trouble. Legal advice is essential.

Financial problems are epidemic among Indians. High pressure collectors and high pressure salesmen sometimes ignore basic fairness in dealing with Indian people.

The current thrust of the American Bar Association for the new fiscal year is to see that legal services are more equitably distributed. New rulings and a brand new approach is aimed directly at the grass roots level.

Recent Federal surveys point out statistics which depict a horrifying situation among Indian youth. In some counties, children under 21 constitute 52% of the Indian population.

The principal thrust of the Jim Thorpe Estate is to instill pride in the Indian youngster. In the past, the sense of hopelessness has been a self-fulfilling prophecy.

The Indian drop out rate is 80% in some counties. In other counties, 30% to 40% of the Indian youth have been made wards of the court.

Median Indian family income based on careful surveys in 1971, showed the average to be \$847.00 FOR THE ENTIRE FAMILY, FOR THE ENTIRE YEAR!

Indian teen-agers now have a history of sniffing glue and paint spray at age 11, 12 and 13. Such children go on to grass and alcohol in most instances.

To help the children it is necessary to help the parents. It is imperative to intervene early enough to allow youngsters to develop self-esteem and pride.

The Estate is printing and distributing certificates of proficiency in scholarship and athletics, and the heirs make public appearances to aid tribal programs.

However, the WATS line is a step in a new direction, and is thus far productive.

[Whereupon, at 11:55 a.m., the subcommittee recessed, to reconvene at the call of the Chair.]

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